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*Moral Courage or Heresy:
The Benefits and Pitfalls of Military Leaders Speaking Out*

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Executive Summary

Title: Moral Courage or Heresy: The Benefits and Pitfalls of Military Leaders Speaking Out.

Author: Major Jacob M. Matt, USMC.

Thesis: Military leaders who allow their experience and loyalty to their oath guide their actions when speaking out in the proper forums for or against policies, strategies, or ideals can positively affect the welfare of the troops in the field and build a bridge with civilian leadership and the civilian population.

Discussion: Today's battlefield is evolving. Every policy that is set forth and every decision that is made affects military professionals down to the rifleman. Sometimes situations evolve to a point to where they are not recognizable from the original starting point. This is where leadership decisions and policies must evolve, also. Unfortunately, there are times when this is not the case. It is up to military leaders to identify these instances and use moral courage and loyalty to their oath to confront these situations. The Uniform Code of Military Justice (UCMJ) and Department of Defense Directives (DODD) set rules and guidelines that all uniformed professionals must follow when taking issue with bad decisions, outdated policies, or improper behavior of their elected officials. No matter what the cause, it must be scrutinized and, if the matter is flawed, it must be unveiled. However, some professionals take the wrong path to uncover these flaws. Name-calling, unsubstantiated accusations, and general unofficer-like behavior are unacceptable and must not be used. If it is time to speak out, it is the duty of the professional military leader to expose flawed thinking and attempt to rectify the situation.

Conclusion: Every military leader must put aside careerist goals and rank ambition in order to speak up for what is right. They must expose flawed policies, strategies, and decisions in order to possibly save the lives of our servicemen and protect the country.

DISCLAIMER

THE OPINIONS AND CONCLUSIONS EXPRESSED HEREIN ARE THOSE OF THE INDIVIDUAL STUDENT AUTHOR AND DO NOT NECESSARILY REPRESENT THE VIEWS OF EITHER THE MARINE CORPS COMMAND AND STAFF COLLEGE OR ANY OTHER GOVERNMENTAL AGENCY. REFERENCES TO THIS STUDY SHOULD INCLUDE THE FOREGOING STATEMENT.

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My Father has shaped me to be passionate about the little things. He has taught me always take a side and to take responsibility for my actions when I've chosen wrong. Moreover, he taught me to sweat the small stuff; because if you don't, it only becomes big stuff. Additionally, his assistance with legal research was invaluable, especially since it was done from 1100 miles away. Finally, I would like to thank my wife, Jennifer, and our fantastic children, Isabel and Jack. Their emotional and physical support, understanding, and prayers have allowed me to spend endless hours in "the hole" making my research and writing possible.

Preface

In February 2003, Task Force East floated in the Northern Arabian Gulf with the 2nd Marine Expeditionary Brigade embarked. This MAGTF (Marine Air Ground Task Force) consisted 2nd Marine Regiment (Reinforced), Marine Air Group 29 (Reinforced), and 2nd Force Service Support Group (Reinforced). I was a CH-53E Super Stallion Aircraft Commander with Heavy Marine Helicopter (HMH) Squadron 464. One evening an officer with 1st Marine Expeditionary Force came to the ready room aboard the USS Kearsarge to brief us on the concept of operations (CONOPS) for the invasion of Iraq. The last question of the evening was one that was a sign of the events to come. One of my squadron-mates asked, "What next?" The answer was startling. The officer said, "I don't know, ask GEN Garner." He was referring to retired Army LTG Jay Garner who was to head the Iraqi reconstruction effort before he was abruptly replaced by Ambassador Paul Bremer. No one in the planning cells leading up to the invasion of Iraq asked a similar question or was ignored when they asked it. No one had the moral courage to ask why we were not listening to our own experts about what was to come after combat operations concluded.

This theme has played out all too often in our military today. Careerism, self-preservation, and misplaced loyalty have gotten in the way of moral courage. The country has grown tired of "rank protectors" with a, "Yes Sir, Yes Sir, Three bags full" attitude. This is the reason I have chosen to research and write on the topic of speaking out when something is not right and the benefits that our country gains by laying your rank on the table.

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INTRODUCTION

Above all things, a Hun must be loyal. Disagreement is not necessarily disloyalty. A Hun who, in the best interest of the tribe, disagrees, should be listened to. On the other hand, a Hun who actively participates in or encourages actions that are counter to the good of the tribe is disloyal. These Huns, whether warrior or chieftain, must be expeditiously removed. Their ability to influence and discourage loyal Huns is a contagious disease.¹

-Attila the Hun

Loyalty is one of the most misunderstood and misused leadership qualities. Who is that loyal directed to? Is it to superiors or is it to the troops? On the other hand, is it both? Leaders of men must deal with this quandary on a daily basis. Random House defines loyalty as, "faithful to one's allegiance, as to a government or friends." There is a second, and more important, definition listed that is much more succinct to military leaders, which is "faithful to one's oath."² The oath of office that every military officer must take compels him to swear to "...support and defend the Constitution of the United States, against all enemies, foreign and domestic..."³ He is to do so of his own free will and with loyalty to the very oath he is taking. This oath is what defines military leadership. Every officer in command of troops must live by this loyalty to oath. It is what all troops must demand. The intent of this essay is to prove that speaking out for what is right can greatly benefit the military and the country. It has been shown that by not speaking out a chasm has been created between our civilian and military leaders as well as the military establishment and the public. Loyalty has its faults; however, men of arms must never allow false and careerist loyalty to preclude them from making the right decisions, at the right time, and for the right reasons.

There must be a clear distinction drawn between speaking out for one's beliefs and acting on or promoting political partisanship. There is no intent to prove that military officers should attempt to surmount or ride roughshod over civilian leadership; this promotes mutiny at the very

least. Worse, it would put asunder the very balance that our forefathers envisioned.⁴ The country's founders had a genuine fear of possible abuse by the military. Alexander Hamilton wrote in *Federalists* No. 28:

Independent of all other reasonings upon the subject, it is a full answer to those who require a more peremptory provision against military establishments in times of peace to say that the whole power of the proposed government is to be in the hands of the representatives of the people. This is the essential, and, after all, the only efficacious security for the rights and privileges of the people which is attainable in civil society.⁵

Military officers should also avoid becoming actively and outwardly political. This represents a clear departure from the good order and discipline ingrained in military leadership. It also promotes distrust between society and the military, which would put the nation at risk. Political scientist Samuel Huntington states a theory that military officers must be politically neutral. He stresses that the profession of arms and leadership must be conducted outside the confines of the political sphere. The protection of the populous depends on this professionalism. Civilian interference (not to be confused with civilian leadership) of military matters can be manifested through a threat of civilian control if military officers are allowed to intercede in political matters.⁶

Speaking out is thus not defined by finding the nearest microphone and airing one's grievances or thoughts to anyone who will listen. It is also not to be someone's target of opportunity to make the most of an imbedded reporter's presence on the battlefield. One must disagree with methods, procedures, or plans through the chain of command or through the proper oversight venue as is granted military servicemen by appropriate directives and codes. Society wants and needs a loyal leader on the battlefield who is conscientious of his men and the mission and not a mindless robot blindly taking all at face value.

*Throughout this essay, all pronouns will be masculine for simplicity.

BACKGROUND - WHAT ARE THE RULES?

No conversation can begin without first looking at the laws, directives, and instructions that govern political behavior in the military. An examination of these rules and regulations can help to highlight the dilemmas faced by leaders today.

Constitutional Rights:

All citizens enjoy the rights laid out in the Constitution of the United States. Most notably as pertaining to this topic is the First Amendment, which states, "Congress shall make no law respecting an establishment of religion, or prohibition the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."⁷ Simply interpreted, this amendment implies that Americans can say or write what they want and to whomever they want. However, it does not to allow slanderous or morally harmful speech or print. One also cannot actively promote the overthrow of government or civil order.

The forefathers advocated for citizens to take responsibility for their actions knowing that they are held liable for those actions and are under the control of the civic authority.⁸ Hence, the "simple" interpretation of the First Amendment to which many Americans often cling is not the correct interpretation at all. Military leaders must also follow separate directives that the average American does not; therefore, they must live by the full interpretation of the Amendment in order to fulfill their civic duties.

Department of Defense Directives:

There are many Department of Defense Directives (DODD) that govern the conduct of uniformed military personnel and their behavior as it pertains to the freedom of expression. DODD 1325.6 consists of guidelines for handling dissident and protest activities in the armed

services. It specifically states that commanders should not restrict members of their command concerning expression of one's beliefs.⁹ Conversely, it lists numerous prohibited activities. For example, the distribution of printed material cannot contain issues that will affect the discipline or morale of his troops. In addition, DODD 1325.6 restricts the participation in on-base demonstrations and off-base demonstrations where a service member will bring discredit to his unit or service by willfully breaking the law or inciting violence.¹⁰ This directive also references DODD 1334.01, which regulates the wearing of the uniform. DODD 1334.01 states in its simplest terms that no member of the armed forces may wear their uniform if their action will bring discredit to his service in particular and the Armed Services as a whole.¹¹ DODD 1325.6 gives full discretion and objectivity to the commander to determine whether the level of expression is detrimental to the unit and would destroy its effectiveness. This order also gives the commander the full complement of disciplinary actions that can be taken.¹²

DODD 1344.10 covers the participation in political activities by members of the armed forces. The directive actively promotes participation in the civic duties that all citizens have the privilege of performing. Permitted activities include voting, attending rallies and political gatherings when not in uniform, contributing to a political organization, and expressing one's opinion on a particular candidate or position as long as it is not given as a member of the United States Armed Forces.¹³ Of particular interest is the fact that it is permissible to express one's personal views on a political candidate in a letter to the editor of a newspaper. However, the directive makes a contrarian point by stating that these letters can be published only if they are not associated with a coordinated campaign to solicit votes for or against a particular candidate or cause.¹⁴ The intent of DODD 1344.10 is to ensure members of the armed forces enjoy all the

rights afforded to every citizen and to enjoy those rights and privileges using commons sense and good judgment.

Uniform Code of Military Justice (UCMJ):

Commissioned officers who convey contempt towards the President of the United States or other officials face punishment by court-martial under Article 88 of the Uniform Code of Military Justice. The Article states:

Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Homeland Security, or the Governor or legislature of any State, Territory, Commonwealth, or possession in which he is on duty or present shall be punished as a court-martial may direct.¹⁵

However, a closer look at Article 88 and the explanation given in the *Manual for Courts-Martial* provides a different interpretation of the text of the statute. It cites that an individual cannot be charged with a violation of this article if the criticism is given during a political discourse, no matter how strongly expressed.¹⁶

Officers have rarely been charged with this offence since 1950 when the UCMJ was made into law. The last documented conviction under Article 88 occurred in 1965 when the Army charged Reserve Second Lieutenant Henry Howe for protesting against the Vietnam War and President Lyndon Johnson by carrying a picket sign that criticized and demeaned the President. Specifically it read, "LET'S HAVE MORE THAN A CHOICE BETWEEN PETTY, IGNORANT, FACISTS [*sic*] IN 1968" with "END JOHNSON'S FACIST [*sic*] AGGRESSION IN VIET NAM" on the other.¹⁷ His conviction resulted in his dismissal from the service and he was sentenced to one year in prison, of which he served a little over three months.

In 1967, 2LT Howe appealed this conviction to the United States Court of Military Appeals. His petition for review was based on his claim that the wording of Article 88 and

Article 133 (Conduct unbecoming an officer and a gentlemen), of which he was also charged, are so vague that the ambiguities violate due process of the First Amendment of the Constitution. He also argued that the explanation given in the *Manual for Courts-Martial* cited above protected his right to carry such a sign as it was used "in the course of political discussion."¹⁸ In its response, the Court noted that the laws pertaining to these charges are not new to the UCMJ; in fact, these laws actually predate the Constitution and are older than the country itself. The Court went on to say that Congress has a right to protect its citizens and leaders from language or actions that constitute evils aimed at the Republic. Second Lieutenant Howe's remarks on the sign he was holding, according to the Military Court of Appeals, proved to meet this criterion. The Court upheld his conviction.¹⁹

The most recent event that involved a possible Article 88 court-martial involved U.S. Air Force Lieutenant Colonel Steven L. Butler. He wrote in a letter to the editor of a local newspaper calling President George W. Bush a "joke," and characterizing his actions after the September 11, 2001, terrorist attacks "sleazy and contemptible."²⁰ The letter, published in the *Monterey County (California) Herald* on May 26, 2002, also accused the president of having prior knowledge that the attacks were going to take place and implicated that he could have prevented them. When the Air Force found out that LtCol. Butler wrote the letter, he was relieved of his position as vice chancellor for student affairs at the Defense Language Institute. The Air Force has since decided not to pursue Article 88 court-martial proceedings.²¹

WHEN IS IT RIGHT? WHEN IS IT WRONG?

This essay will now discuss numerous individuals that decided to speak out in some way. Many are household names and their cases, because they occurred relatively recently, are well

known. Others are not. In all cases, the individual felt they had the right cause or were fighting for a greater good. However, some confused the right to expression with what is good for their service and country.

History and its Teachings

If men are to be precluded from offering their sentiments on a matter which may involve the most serious and alarming consequences that can invite the consideration of mankind, reason is of no use to us; the freedom of speech may be taken away, and dumb and silent we may be led, like sheep to the slaughter.²²

- President George Washington
Newburg Address, 15 March 1783

The Newburg Conspiracy was a crucial point in the history of America.²³ As the new nations struggled to stand financially, veterans of the War of American Independence who had been fighting for almost six years had now come to expect compensation from their government. Many had not received pay for most of the six years of the conflict and many unsettled debts to the officers and men were due. A group of officers with the backing of General Horatio Gates sent President Washington a unanimous letter proclaiming their grievances and threatening to remain as an established Continental Army unless Congress met the demands of compensation and back pay. Upon receiving the letter, Washington issued an order condemning the irregular correspondence.

A second unsigned letter accused President Washington of, in essence, being party to the alleged inadequacies of the Congress and the newly formed government. Washington now felt the gravity of the situation and the possibility of a military uprising. He acted immediately. He called for a meeting with the officers to quell the possibility of a coup. During the address, he delivered the above quote as a way to let the gathered men know the importance of dialogue with the leadership establishment and the necessity of that dialogue being open and honest. He also let them know that he never ceased being a soldier in arms with them and that they must show

loyalty to themselves by trusting the government that they fought to build. While reading a letter from Congress detailing the financial predicament the newly formed Republic was in, Washington had to pause to don his reading glasses. In doing this he said, "Gentlemen, you will permit me to put on my spectacles, for I have not only grown gray but almost blind in the service of my country."²⁴ This simple act humanized Washington. It made the gathered officers acknowledge where their loyalties were.

By speaking out, the group of officers forced Congress to acknowledge its financial troubles and President Washington to confront the literal face of the struggling Union. Loyalty to each other, their oath, and to the country manifested from open and frank dialogue. The Newburg Conspiracy and Address show that disagreement does not equal disloyalty. However, when does this loyalty become detrimental to the unit, service, or country? When does the cause become bigger than the individual? A leader must understand when he has become (or will become) a contagious disease to his unit. He must also understand when that disease is the higher leadership and when it is time to dissent for the good of the organization or country as a whole. It is absolutely necessary for those that affect the business end of our military services to ensure that the faithfulness to one's oath is adhered. This may be more important than one's career.

During a conversation with a conference group after his presentation to Marine Corps Command and Staff College students, former Commander-in-Chief of United States Central Command and retired Marine Corps General Anthony Zinni was asked his opinion on a subject he is very qualified to answer. Gen. Zinni was asked if it is proper for an officer to say, "enough is enough." Can a military leader question his superiors if something is just not right? His answer was a testament to his ethos. Gen. Zinni said that leaders must know that the cause is

right and worth losing one's career. He said that an officer must be willing to take off the rank, lay it on the table, and walk away if necessary.²⁵ The basis for this belief may have come from experiences and promises made on the battlefield early in his career. In the book *Battle Ready* that he wrote with novelist Tom Clancy, he gives insight to that belief: "As long as guys are dying out there, it is morally reprehensible to criticize the flawed policies and tactics that put them in that predicament. Bullshit. I vowed long ago to a wounded young lance corporal in Vietnam that I would never shrink from speaking out."²⁶ This is something to which too few leaders have adhered.

Every news organization, press outlet, and medial blog has reported the ongoing dissention that active and retired generals and senior leader have for the policies of the Department of Defense. In April of 2006, Fred Kaplan, a columnist for the left-leaning online magazine *Slate*, went as far to broach the subject of then Secretary of Defense Donald Rumsfeld's ability to court-martial under Article 88²⁷ retired and active duty general officers who openly disagreed with his handling of the War in Iraq. These news outlets must fill untold pages of print and hours of dialogue while reporting in a 24-hour news cycle that must hold the viewer captive. Mr. Kaplan's argument is trivial and only sensationalizes a serious topic that is confronting today's military leaders. When is it right to question senior leadership on matters of domestic and foreign policy? How should these leaders approach these topics? When does it become personal? When is speaking out wrong and become detrimental to the country?

What is Right?

In February 2003, the Chief of Staff of the Army, General Erik Shinseki, presented testimony before Congress that the troops needed to invade and occupy Iraq would exceed those presently allocated. His testimony also included thoughts that ethnic and cultural tensions may

arise that require the commitment of vast numbers of troops and assets to maintain security.²⁸ GEN Shinseki was widely criticized by Pentagon officials for contradicting their assessment of these and other issues involving the upcoming invasion. The Deputy Secretary of Defense, Paul Wolfowitz, went as far to say that the general's estimates were "wildly off the mark."²⁹ GEN Shinseki was not purposefully being defiant of his Pentagon bosses. He was stating his own professional opinion. Pentagon leadership obviously did not receive this opinion well. GEN Shinseki's assessment of the situation has since come to fruition. Former Joint Chief of Staff Chairman General Richard Meyers said of GEN Shinseki, "He was inappropriately criticized, I believe, for speaking out," and that it was a mistake not to follow his experience.³⁰ GEN Meyers also points out that GEN Shinseki did not push for changes to policy after his testimony. When answering criticism that he did not speak out more forcefully, he said, "Probably that's fair. Not my style."³¹

GEN Shinseki was ultimately correct to speak out to the Senate Armed Forces Committee and should have spoken more forcefully. He obviously believed the current allocated troop strength was inadequate. It is not the objective of this essay to project blame or assess the damage that may or may not have been caused by the Pentagon's unwillingness to listen to its senior military experts. However, it is unavoidable to attempt to predict the results of the two years following the invasion of Iraq and if it would lead to a more successful and peaceful outcome if GEN Shinseki's proposals were pushed and followed. Because of his testimony and disconnects with senior Pentagon officials, Secretary Rumsfeld picked the general's replacement one year earlier than required and slighted him by not attending his retirement ceremony, as is custom. He should have made the most of his "punishment."

Retired Marine Corps General Anthony Zinni has never shied away from expressing his view of what is right. He gave his opinions of the invasion of Iraq before the war began. He said in an August 23, 2002, speech to the Florida Economic Club that, "Attacking Iraq now will cause a lot of problems. I think the debate right now that's going on is very healthy."³² The debate of which he was referring was that of former generals and current policy leaders in the administration. The main issues concerned troop strength and the complexity of the reconstruction effort that will result from the replacement of the Saddam Hussein regime. In May 2004, Gen. Zinni gave an interview to CBS News when the policies set forth by Secretary of Defense Donald Rumsfeld and Secretary of Reconstruction and Humanitarian Assistance Paul Bremer were coming under intense scrutiny.³³ In this interview, he said the administration and policy makers in the Pentagon made the wrong assumption concerning the Iraqi people and the effort it would take to reconstruct the country. His assertions brought criticism. When asked why he decided to speak out, he said it was his responsibility to do it. He said, "It is part of your duty. Look, there is one statement that bothers me more than anything else. And that's the idea that when the troops are in combat, everybody has to shut up."³⁴ Gen. Zinni went on to compare a failed policy to that of putting troops into combat with a faulty rifle saying, "I can't think anyone would allow that to happen, that would not speak up. Well, what's the difference between a faulty plan and strategy that's getting just as many troops killed? It's leading down a path where we're not succeeding and accomplishing the missions we've set out to do."³⁵

Gen. Zinni does not stop at delivering his own thoughts. He also takes those to task that do not do their duty and speak out. In an interview on MSNBC's, *Meet the Press* on April 2, 2006, Gen. Zinni criticized those who did not speak up to take responsibility for their action. He said, "I think that...those that have been responsible for the planning, for overriding all the, the

efforts that were made in planning before that, that those that stood by and allowed this to happen, that didn't speak out. I think they have to be held accountable."³⁶ Gen. Zinni has always been, and continues to be, antithesis of the "don't rock the boat" mentality saying that it "leads to moral blindness about threats to the mission or the lives and welfare of the troops and of their families."³⁷ His actions should be the guidepost by which all military professionals are tied.

Speaking out and giving an opinion that is controversial and unwanted can lead to the loss of a job or career. This almost happened to Army Reserve Major Stephen Coughlin. MAJ Coughlin is working as a civilian contractor for the Joint Chief of Staff as an expert on Shariah, which is an Islamic code that derives from the Quran and forms a bond between church and state. The Pentagon fired him in January 2008, for not softening his views on certain Islamic fundamentalist organizations. He presented these arguments in his Masters of Science of Strategic Intelligence thesis while attending the National Defense Intelligence College.³⁸ His criticisms concerning these groups and their motivations came in direct contrast with one of Deputy Secretary of Defense Gordon England's chief advisors on Islam, Hasham Islam.³⁹ Because MAJ Coughlin stood by his evaluations, Pentagon leadership felt the friction between the two experts was too controversial and supposedly fired him.

The battlefield is not the only arena that the War on Terror is raging. America is also fighting a war of ideas. There are those that subscribe to the thought that reaching out to certain organization on a global scale and pandering to them is the answer. Mr. Islam is one of those who believe this. He has persuaded Pentagon officials to open dialogue with organizations such as the Islamic Society of North America, which, according to the Department of Justice, is associated with the Muslim Brotherhood.⁴⁰ The Muslim Brotherhood is an organization that has

long been attempting to modify its extremist position in order to coddle the west. Their extremist mandate states that all Americans; whether soldiers, support personnel, or non-military civilians; are an enemy of Islam and must be killed.⁴¹ MAJ Coughlin argues that we must see the true spirit of these radical Islamic movements and confront them, which is in deep contrast with Mr. Islam's view and the catalyst for the conflict.

MAJ Coughlin's obviously subscribes to the idea that the country must stand strong against the false veil that most extremist terror organizations wish to show. The Pentagon supposedly planned to dismiss him for speaking out against convention. However, recent Congressional inquiries have forced Pentagon leaders revisit his case and have decided to retain him for the very reasons that they were going to fire him - because he spoke out.⁴² MAJ Coughlin's case shows that the most ingenious ideas and opinions come from those officers that stand up and speak out when they are encouraged and protected by their seniors.

These officers all have two things in common: a deep-seated belief in what they are doing is right and the knowledge that speaking out could possibly have a monumental effect on the troops they serve. They have also avoided violating the Department of Defense Directives and the UCMJ. This is because these leaders projected their views in the appropriate forums and without contemptuous underpinnings or personal vendettas. They have simply done what is right and made an enormous impact in the war of ideas.

What is Wrong?

In 1998, President William Clinton faced four articles of impeachment. Congress impeached him for giving perjurious and misleading statements to the grand jury involving the case *Clinton v. Jones*.⁴³ This case accused President Clinton of making, "abhorrent sexual advances"⁴⁴ towards former Arkansas state employee Paula Jones and caused her to face

disciplinary action because of rejecting those advances. Congress also accused him of lying about an adulterous affair involving White House intern Monica Lewinsky. Additionally, Congress charged the President with obstruction their investigation. The Senate voted in February 1999, and, even though all accusations have proven correct, failed to convict.

Marine Corps Major Shane Sellers and Marine Corps Reserve Major Daniel Rabil fell into the trap of contemptuous behavior. Maj. Sellers wrote an article in the *Navy Times* on October 12, 1998, giving his opinion about the President's actions and the sexual relations with Ms. Lewinsky. He wrote, "It's not about sex...It's tawdry and titillating, to be sure. But for all its soap-opera quality, what Clinton and Monica did as consenting adults boils down to adultery. And one should call an adulterous liar exactly what he is -- a criminal."⁴⁵ Although this is the tagline caught by the media, the crux of Maj. Sellers' article is the fair treatment of all who serve the country. His argument, though thinly veiled, is that the UCMJ Article 134 holds officers accountable for committing adultery, for which a dishonorable discharge is the maximum penalty.⁴⁶ Additionally, if a court proves that an officer perjured himself he faces up to five years in prison and an honorable discharge under Article 131.⁴⁷ These are the rules that military leaders must operate by. Maj. Sellers simply asks why the Commander in Chief does not have to abide by them also.

One cannot deny that the accusations made, no matter political affiliation or social allegiance, are true. President Clinton did have inappropriate sexual relations with a woman other than his wife and he did lie to a grand jury. Maj. Sellers was trying to make the point that he should be held to the same standards as all military leaders. However, a military officer cannot bring personalized attacks against the President. There are no serious policy decisions or troops' welfare hanging in the balance. Maj. Sellers is simply a writer for the *Navy Times* who

wrote an opinion piece. He just happens to be a Marine Corps officer, also. Although he felt honor was at stake, calling the President of the United States and "adulterous liar" is not right. Because of his actions, Maj. Sellers' received what amounted to formal counseling by his base commander. Although he faced punishment under Article 88, no other punitive action was taken.⁴⁸

Maj. Daniel Rabil's statements were much more egregious. He wrote an opinion article for the *Washington Post* in November 1998. In this article, he questions President Clinton's ability to lead the military because of the accusations brought against him. Maj. Rabil says, "It is immoral to impose such untrustworthy leadership on a fighting force," and, "...you don't make an atheist pope, and you don't keep a corrupt security risk as commander-in-chief."⁴⁹ He also calls President Clinton's respect for the military into question. He talks about an instance that is allegedly in a Congressional investigative report stating that the President had sexual relations with Ms. Lewinsky while discussing troop deployments on the telephone. To this, Maj. Rabil demands, "We are entitled to a leader who at least respects us -- not one who cannot be bothered to remove his penis from a subordinate's mouth long enough to discuss our deployment to a combat zone."⁵⁰

Like Maj. Sellers' article, Maj. Rabil is trying to make a legitimate point. He is questioning the President's ability to lead the nation and the military effectively because of the impeachment proceedings and the accusations brought against him. His argument deals with integrity and legitimacy. However, using the terms, "lying draft dodger," "moral coward," and "anti-American"⁵¹ to describe the Commander-in-Chief is inappropriate, unprofessional, and possibly criminal under the UCMJ. Maj. Rabil professes in his article that he is fully aware of his actions and the consequences they might bring. He states, "I therefore risk my commission,

as our generals will not, to urge this of Congress: Remove this stain from our White House.”⁵² Maj. Rabil’s assessment of risking his career was correct. He effectively is laying his rank on the table, albeit for the wrong reasons. The Marine Corps Reserves placed Maj. Rabil in a non-drill status and put a letter of caution in his official record, effectively ending his career.⁵³

Once again, no one can dispute the accuracy of the statements. However, the risk that Maj. Rabil took would not have been so egregious if he would have avoided the unacceptable personal attacks and maintained professionalism.

The Differences

Although these last examples involve a single topic that has become one of the most controversial in recent history, they show that legitimate, well thought out issues are tainted by speaking out for the wrong ideals. As a result of these attacks on President Clinton in the late 1990s, Assistant Commandant of the Marine Corps General Terrence Dake sent an electronic memorandum (email) to all general officers reminding them of the rules laid out in the UCMJ. He wrote in this email, “It is unethical for individuals who wear the uniform of a Marine to engage in public dialogue on political and legal matters such as impeachment⁵⁴...We are not politicians. We are not a corps of lawyers. We are warriors, nothing more, nothing less.”⁵⁵

Gen. Dake was correct in saying that military leaders should not involve themselves in petty political issues. Personal attacks and name-calling are perfect examples of unacceptable officer-like behavior. The officer who writes about the fitness of a president or the feasibility of a policy or plan must legitimize his argument with facts. He must be consistent, professional, and give his analysis in the proper venue and context as GEN Shinseki, Gen. Zinni, and MAJ Coughlin. They also must not fold to the pressure of ridicule and alienation. Doing so only

increase the growing disconnect between the civilian administration, military leaders, and the public.

The Next Generation

The web log or blog by definition is an online diary published on a web page that is accessible to anyone.⁵⁶ It has become the instrument of choice for those who want their thoughts known. Typing "military blog" into any search engine on the internet results in an untold number of websites dedicated to expressing views, ideas, and personal vignettes. Young servicemen often use these blogs as personal journals to keep up with friends and family. However, some of the servicemen's blogs produce inflammatory, misleading, or dangerous information. These blogs have often caused problems and consternation among senior leadership as the War on Terror continues. In August 2006, the Pentagon sent a memorandum concerning information security and website alerts.⁵⁷ This memorandum prohibits individuals from placing information on websites that have unrestricted public access. Specifically concerning blogs, it states, "Commander shall ensure subordinates are aware that...personal blogs (i.e., those not having DOD sponsorship and purpose) may not be created/maintained during normal duty hours and may not contain information on military activities that is not available to the general public."⁵⁸

Lieutenant General William Caldwell, Commanding General of the Combined Arms Center at Ft. Leavenworth recently dissented on this premise of not allowing service members the ability to blog.⁵⁹ He expressed this on the *Small Wars Journal* website on, none other than, a blog. He stated that the enemy is winning the information warfare battle. LTG Caldwell argues that the Army must change its culture of neglecting the information battlefield and allow servicemen to post videos and blogs in order to capture and maintain the initiative in the war of

information. These web entries can hit before the enemy's does, thereby refuting false information that can hamper the efforts of the commanders in the field.

LTG Caldwell's view of blogging has an underlying theme. He is speaking out on the status quo of an older generation. In order to solve the "problem" of bloggers the general produces a series of training criteria for which a commander is responsible.⁶⁰ He is calling on the loyalty of all servicemen to ensure what they put on the internet benefits the United States' Global War on Terrorism Grand Strategy.

The Failure of Leaders - LTC Yingling

Moral courage is often inversely proportional to popularity and this observation is nowhere more true than the profession of arms. The history of military innovation is littered with the truncated careers of reformers who saw gathering threats clearly and advocated change boldly. A military professional must possess both the physical courage to face the hazards of battle and the moral courage to withstand the barbs of public scorn.⁶¹

LTC Paul Yingling
"A Failure in Generalship"

There is no worse sin in leadership than the inability to stand for an ideal in the face of ridicule. LTC Yingling's article in the *Armed Forces Journal* is a microcosm of the premise that one must stand for his beliefs and be prepared to take the consequences for his actions. He states that the "intellectual and moral failures"⁶² of today's general officers and their inability to take action when the country needs it most has broken down the trust of junior leaders.

LTC Yingling's article has since brought some general officers out to speak. Unfortunately, some generals are doing so in order to salvage their reputations. In an October 2007, article, Retired Lieutenant General Ricardo Sanchez, former commander of Multi-National Force - Iraq (MNF-I), blasted President Bush and senior Pentagon officials saying, "...we are destined to fail. There is nothing going on in Washington that would give us hope."⁶³ These comments given in a more diplomatic way and in a timely matter could have changed what he

saw as failing policies. However, LTG Sanchez was roundly criticized for waiting so long to speak on his misgiving about the strategy in Iraq. He was wrong for not using his experiences in Iraq as a catapult to express his views to his seniors. LTG Sanchez actions after the fact also come close to cowardice.

SOLUTIONS AND CONCLUSION

The forefathers laid the basis in the Constitution for civilian control of the armed forces. The Federalist Papers also emphatically promote this premise. Just as those that formed the Republic were afraid of military rule, so must military leaders be wary of civilian administrators who are ignorant of happenings outside the Congressional buildings, Pentagon, or White House. Professionals in arms have often criticized civilian leaders of not understanding the dirty, ugly world in which soldiers of all uniforms live. Likewise, administration officials are often critics of the regimented lifestyle of the military.

President Theodore Roosevelt gave these thoughts in a speech at the Sorbonne in Paris, France in 1910:

It is not the critic who counts: not the man who points out how the strong man stumbles or where the doer of deeds could have done better. The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood, who strives valiantly, who errs and comes up short again and again, because there is no effort without error or shortcoming, but who knows the great enthusiasms, the great devotions, who spends himself for a worthy cause; who, at the best, knows, in the end, the triumph of high achievement, and who, at the worst, if he fails, at least he fails while daring greatly, so that his place shall never be with those cold and timid souls who knew neither victory nor defeat.⁶⁴

President Roosevelt took exception on those that lead without being in the battle. This problem creates a rift between civilian and military leadership. Too few top civilian leaders have served on active duty in the armed forces. Secretary of Defense Robert Gates served two years

in the Air Force in the 1960s. During the Clinton Administration, only Secretary of Defense Les Aspin served on active duty as an Army officer. No other top official has worn an active duty uniform.

The solution to this lack of professional military experience is very simple, yet will create extreme controversy. Prior to holding any elected or appointed federal office it should be required that individuals serve a minimum of two years on active duty in any of the four United States Armed Services or the Coast Guard. This policy would not only break the barrier between civilian and military leadership, but also enable more trust to exist and allow honest dialogue to flow. Additionally, military leaders who use intrusive civilian leadership as an excuse to silence their candor may now have a bridge to express their thoughts.

Audacity is a word that often has negative connotations. A great leader cannot lead unless he possesses audacity as a virtue. However, that leader must also know when to display that audacity and when to hide it. Loyalty to one's oath to defend the Constitution must override all personal and professional careerist goals.

Speaking out for a cause that is right and delivered in the proper venue has the chance to change the course of failed policies. If these policies or strategies are not changed, one can hope that learning from the mistakes made prepares the country for the next battle. Because of leaders such as Gen. Zinni, LTC Yingling, and MAJ Coughlin; battlefield commanders and military leaders are speaking out and being heard in Washington.

APPENDIX A



Department of Defense
DIRECTIVE

NUMBER 1325.6

October 1, 1996

Certified Current as of December 1, 2003

USD(P&R)

SUBJECT: Guidelines for Handling Dissident and Protest Activities Among Members
of the Armed Forces

- References: (a) DoD Directive 1325.6, subject as above, September 12, 1969 (hereby canceled)
- (b) Chapter 47 of title 10, United States Code, "Uniform Code of Military Justice"
 - (c) Title 18, United States Code
 - (d) DoD Directive 1334.1, "Wearing of the Uniform," August 11, 1969
 - (e) Title 10, United States Code

1. REISSUANCE AND PURPOSE

This Directive reissues reference (a) to update DoD policy and responsibilities governing the handling of dissident activities by members of the Army, Navy, Air Force, and Marine Corps. Specific problems should be resolved only on the basis of the particular facts of the situation and in accordance with the provisions of applicable DoD regulations and reference (b).

2. APPLICABILITY

This Directive applies to the Office of the Secretary of Defense, the Military Departments (including the Coast Guard when it is operating as a Military Service in the Navy), the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Defense Agencies, and the DoD Field Activities (hereafter referred to collectively as "the DoD Components"). The term "Military Services," as used herein, refers to the Army, the Navy, the Air Force, and the Marine Corps.

3. POLICY

It is DoD policy that:

- 3.1. The Department of Defense shall safeguard the security of the United States.
- 3.2. The Service members' right of expression should be preserved to the maximum extent possible, consistent with good order and discipline and the national security.
- 3.3. No commander should be indifferent to conduct that, if allowed to proceed unchecked, would destroy the effectiveness of his or her unit.
- 3.4. The proper balancing of these interests will depend largely upon the calm and prudent judgment of the responsible commander.
- 3.5. The following guidelines be applied to principal activities that the Armed Forces have encountered:

3.5.1. Possession and Distribution of Printed Materials

3.5.1.1. A commander is not authorized to prohibit the distribution of a specific issue of a publication distributed through official outlets such as post exchanges and military libraries. In the case of distribution of publications through other than official outlets, commanders may require that prior approval be obtained for any distribution on a military installation to determine whether there is a clear danger to the loyalty, discipline, or morale of military personnel, or if the distribution of the publication would materially interfere with the accomplishment of a military mission. Distribution of any publication determined to be a danger in any of these areas shall be prohibited.

3.5.1.2. While the mere possession of unauthorized printed material may not be prohibited, printed material that is prohibited from distribution shall be impounded if the commander determines that an attempt will be made to distribute.

3.5.1.3. The fact that a publication is critical of government policies or officials is not, in itself, a ground on which distribution may be prohibited.

3.5.2. Off-Post Gathering Places. Commanders have the authority to place establishments "off-limits" in accordance with established procedures when, for example,

the activities taking place there include counseling members to refuse to perform duty or to desert; pose a significant adverse effect on Service members' health, morale, or welfare; or otherwise present a clear danger to the loyalty, discipline, or morale of a member or military unit.

3.5.3. Servicemen Organizations. Commanders are not authorized to recognize or to bargain with any union representing or seeking recognition to represent Service members.

3.5.4. Publication of "Underground Newspapers." Personal writing for publication may not be pursued during duty hours, or accomplished by the use of Government or non-appropriated fund property on- or off-duty. While publication of "underground newspapers" by military personnel off-post, on their own time, and with their own money and equipment, is not prohibited, if such a publication contains language the utterance of which is punishable under Federal law, those involved in the printing, publication, or distribution may be disciplined for such infractions.

3.5.5. On-Post Demonstrations and Similar Activities. The commander of a military installation or other military controlled facility under the jurisdiction of the United States shall prohibit any demonstration or activity on the installation or facility that could result in interference with or prevention of orderly accomplishment of the mission of the installation or facility, or present a clear danger to loyalty, discipline, or morale of the troops. It is a crime for any person to enter a military reservation for any purpose prohibited by law or lawful regulations, or for any person to enter or re-enter an installation after having been barred by order of the commander under 18 U.S.C. 1382 (reference (c)).

3.5.6. Off-Post Demonstrations by Members. Members of the Armed Forces are prohibited from participating in off-post demonstrations when they are on-duty, in a foreign country, when their activities constitute a breach of law and order, when violence is likely to result, or when they are in uniform in violation of DoD Directive 1334.1 (reference (d)).

3.5.7. Grievances. The right of members to complain and request redress of grievances against actions of their commanders is protected by Article 138 of the Uniform Code of Military Justice (reference (b)). In addition, a member may petition or present any grievance to any Member of Congress or an Inspector General under 10 U.S.C. 1034 (reference (e)). An open door policy for complaints is a basic principle of good leadership, and commanders should personally ensure that adequate procedures exist for identifying valid complaints and taking corrective action.

3.5.8. Prohibited Activities. Military personnel must reject participation in organizations that espouse supremacist causes; attempt to create illegal discrimination based on race, creed, color, sex, religion, or national origin; advocate the use of force or violence; or otherwise engage in efforts to deprive individuals of their civil rights. Active participation, such as publicly demonstrating or rallying, fund raising, recruiting and training members, organizing or leading such organizations, or otherwise engaging in activities in relation to such organizations or in furtherance of the objectives of such organizations that are viewed by command to be detrimental to the good order, discipline, or mission accomplishment of the unit, is incompatible with Military Service, and is, therefore, prohibited. Commanders have authority to employ the full range of administrative procedures, including separation or appropriate disciplinary action, against military personnel who actively participate in such groups. Functions of command include vigilance about the existence of such activities; active use of investigative authority to include a prompt and fair complaint process; and use of administrative powers, such as counseling, reprimands, orders, and performance evaluations to deter such activities. Military Departments shall ensure that this policy on prohibited activities is included in initial active duty training, pre-commissioning training, professional military education, commander training, and other appropriate Service training programs.

4. RESPONSIBILITIES

4.1. The Under Secretary of Defense for Personnel and Readiness shall:

4.1.1. Develop overall policy and guidelines for handling dissident and protest activities among members of the Armed Forces.

4.1.2. Approve policies and procedures developed by the Secretaries of the Military Departments that implement this Directive.

4.2. The Secretaries of the Military Departments shall:

4.2.1. Establish policies and procedures to implement this Directive within their respective Departments.

4.2.2. Ensure compliance with the training requirements set out in subparagraph 3.5.8., above.

5. EFFECTIVE DATE

This Directive is effective immediately.

A handwritten signature in dark ink, appearing to read "John P. White", is written over a horizontal line.

John P. White
Deputy Secretary of Defense

Enclosures - 1

E1. Constitutional and Statutory Provisions Relevant to Handling of Dissident and
Protest Activities in the Armed Forces

E1. ENCLOSURE 1

CONSTITUTIONAL AND STATUTORY PROVISIONS RELEVANT TO HANDLING OF
DISSIDENT AND PROTEST ACTIVITIES IN THE ARMED FORCES

E1.1. CONSTITUTION

The First Amendment, U.S. Constitution, provides as follows:

Congress shall make no law...abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

E1.2. STATUTORY PROVISIONS

E1.2.1. Applicable to All Persons

E1.2.1.1. 18 U.S.C. Section 1381, reference (c) -- Enticing desertion and harboring deserters.

E1.2.1.2. Section 2385 -- Advocating overthrow of the Government.

E1.2.1.3. Section 2387 -- Counseling insubordination, disloyalty, mutiny, or refusal of duty.

E1.2.1.4. Section 2388 -- Causing or attempting to cause insubordination, disloyalty, mutiny, or refusal of duty during war.

E1.2.2. Applicable to Members of the Armed Forces

E1.2.2.1. 10 U.S.C. Section 917, reference (e), (Article 117, UCMJ) -- Provoking speeches or gestures.

E1.2.2.2. Section 882 (Article 82, UCMJ) -- Soliciting desertion, mutiny, sedition, or misbehavior before the enemy.

E1.2.2.3. Section 904 (Article 104, UCMJ) -- Aiding the enemy.

E1.2.2.4. Section 901 (Article 101, UCMJ) -- Improper use of a countersign.

E1.2.2.5. Section 888 (Article 88, UCML) -- Contemptuous words by commissioned officers against certain officials.

E1.2.2.6. Section 889 (Article 89, UCML) -- Disrespect toward a superior commissioned officer.

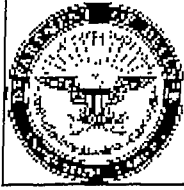
E1.2.2.7. Section 891 (Article 91, UCML) -- Insubordinate conduct toward a warrant officer, noncommissioned officer, or petty officer.

E1.2.2.8. Section 892 (Article 92, UCML) -- Failure to obey order or regulation.

E1.2.2.9. Section 934 (Article 134, UCML) -- Uttering disloyal statement, criminal libel, communicating a threat, and soliciting another to commit an offense.

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APPENDIX B



Department of Defense
INSTRUCTION

NUMBER 1334.01
October 26, 2005

USD(P&R)

SUBJECT: Wearing of the Uniform

References: (a) DoD Directive 1334.1, "Wearing of the Uniform," May 15, 2005 (hereby canceled)
(b) Deputy Secretary of Defense Memorandum, "DoD Directives Review - Phase II," July 13, 2005
(c) Executive Order 10450, April 27, 1953 as amended
(c) Section 772 of title 10, United States Code

1. REISSUANCE AND PURPOSE

This Instruction reissues reference (a) as a DoD Instruction as prescribed by reference (b) and continues to set limitations on wearing of the uniform by members of the Armed Forces. It also continues to establish policy on wearing of the uniform by former members of the Armed Forces.

2. APPLICABILITY

This Instruction applies to the Office of the Secretary of Defense, the Military Departments, the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities in the Department of Defense (hereafter referred to collectively as the "DoD Components").

3. POLICY

It is DoD policy that:

3.1. The wearing of the uniform by members of the Armed Forces (including retired members and members of Reserve components) is prohibited under any of the following circumstances:

3.1.1. At any meeting or demonstration that is a function of, or sponsored by an organization, association, movement, group, or combination of persons that the Attorney General of the United States has designated, under Executive Order 10450 as amended (reference (c)), as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of Government of the United States by unconstitutional means.

3.1.2. During or in connection with furthering political activities, private employment or commercial interests, when an inference of official sponsorship for the activity or interest may be drawn.

3.1.3. Except when authorized by the approval authorities in subparagraph 4.1.1., when participating in activities such as unofficial public speeches, interviews, picket lines, marches, rallies or any public demonstration, which may imply Service sanction of the cause for which the demonstration or activity is conducted.

3.1.4. When wearing of the uniform may tend to bring discredit upon the Armed Forces.

3.1.5. When specifically prohibited by regulations of the Department concerned.

3.2. Former members of the Armed Forces, unless under another provision of this Instruction or under the terms of Section 772 of title 10, United States Code (reference (d)), who served honorably during a declared or undeclared war and whose most recent service was terminated under honorable conditions may wear the uniform in the highest grade held during such war service only on the following occasions and in the course of travel incident thereto:

3.2.1. Military funerals, memorial services, weddings, and inaugurals.

3.2.2. Parades on National or State holidays; or other parades or ceremonies of a patriotic character in which any Active or Reserve United States military unit is taking part.

3.2.3. Wearing of the uniform or any part thereof at any other time or for any other purposes is prohibited.

3.3. Medal of Honor holders may wear the uniform at their pleasure except under the circumstances set forth in paragraph 3.1., above.

4. RESPONSIBILITIES

4.1. The Under Secretary of Defense for Personnel and Readiness and the Principal Deputy Under Secretary of Defense for Personnel and Readiness shall approve the wearing of the uniform for members of the Armed Forces assigned to OSD and the Directors of the Defense Agencies and the Directors of Defense Field Activities for situations under paragraph 3.1.3., and shall ensure the following officials are designed as approval authorities:

4.1.1. The Chairman of the Joint Chiefs of Staff for the Commanders of the Combatant Commands.

4.1.2. The Chairman of the Joint Chiefs of Staff for members of the Armed Forces assigned to the Joint Staff.

4.1.3. The Commanders of the Combatant Commands for members of the Armed Forces assigned to their commands.

4.1.4. The Directors of the Defense Agencies and Directors of Defense Field Activities for the members of the Armed Forces serving within their Agency or Activity.

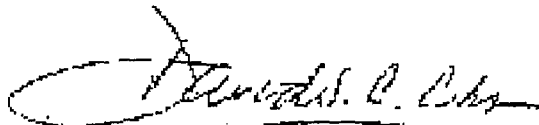
4.1.5. The Secretaries of the Military Departments for members of the Armed Forces serving within their Military Departments.

4.1.6. The Inspector General, Department of Defense, for members of the Armed Forces assigned to the Office of the Inspector General.

4.2. Officials identified in subparagraph 4.1 may delegate their authority to subordinates; however, under no circumstances may a military officer review and approve the wearing of the uniform for himself, herself, or a military superior.

5. EFFECTIVE DATE

This Instruction is effective immediately.



David S. C. Chu
Under Secretary of Defense
(Personnel and Readiness)

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APPENDIX C



Department of Defense

DIRECTIVE

NUMBER 1344.10

August 2, 2004

USD(P&R)

SUBJECT: Political Activities by Members of the Armed Forces on Active Duty

- References: (a) DoD Directive 1344.10, "Political Activities by Members of the Armed Forces," June 15, 1990 (hereby canceled)
- (b) Sections 973, 101, 888, and Chapter 47 of title 10, United States Code
 - (c) DoD Directive 5200.2, "DoD Personnel Security Program," April 9, 1999
 - (d) DoD Directive 1325.6, "Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces," October 1, 1996
 - (e) through (h), see enclosure 1

1. REISSUANCE AND PURPOSE

This Directive reissues reference (a) to update DoD policies on political activities of members of the Armed Forces on active duty and implement section 973(b) through (d) of reference (b).

2. APPLICABILITY

This Directive applies to the Office of the Secretary of Defense, the Military Departments, the Coast Guard when it is not operating as a Military Service in the Department of the Navy by agreement with the Department of Homeland Security, the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities in the Department of Defense (hereafter referred to collectively as the "DoD Components").

3. DEFINITIONS

The terms used in this Directive are defined in enclosure 2.

4. POLICY

It is DoD policy to encourage members of the Armed Forces (hereafter referred to as "members") to carry out the obligations of citizenship. While on active duty, however, members are prohibited from engaging in certain political activities. The following DoD policy shall apply:

4.1. General

4.1.1. A member on active duty may:

4.1.1.1. Register, vote, and express his or her personal opinion on political candidates and issues, but not as a representative of the Armed Forces.

4.1.1.2. Make monetary contributions to a political organization.

4.1.1.3. Attend partisan and nonpartisan political meetings, rallies, or conventions as a spectator when not in uniform.

4.1.2. A member on active duty shall not:

4.1.2.1. Use his or her official authority or influence for interfering with an election; affecting the course or outcome of an election; soliciting votes for a particular candidate or issue; or requiring or soliciting political contributions from others.

4.1.2.2. Be a candidate for, hold, or exercise the functions of civil office except as authorized in paragraphs 4.2. and 4.3., below.

4.1.2.3. Participate in partisan political management, campaigns, or conventions (unless attending a convention as a spectator when not in uniform).

4.1.2.4. Make campaign contributions to another member of the Armed Forces or an employee of the Federal Government.

4.1.3. Enclosure 3 provides examples of permissible and prohibited political activities. The examples in enclosure 3 do not supersede other specific requirements and policies, such as those established by this Directive and DoD Directives 5200.2 and 1325.6 (references (c) and (d)).

4.2. Nomination or Candidacy for Civil Office

4.2.1. A member on active duty may not be a nominee or a candidate for civil office except:

4.2.1.1. For offices covered by subparagraph 4.3.1., when the exception at subparagraph 4.3.2. applies.

4.2.1.2. For offices covered by subparagraph 4.3.4., when one of the exceptions at subparagraphs 4.3.5.1. through 4.3.5.3. apply.

4.2.2. When circumstances warrant, the Secretary concerned or the Secretary's designee may permit a member covered by the prohibition of subparagraph 4.2.1., above, to remain or become a nominee or a candidate for civil office.

4.2.2.1. Such permission shall not authorize activity while on active duty that is otherwise prohibited in subparagraph 4.1.2., above, paragraph 4.3., below, or enclosure 3.

4.2.2.2. Such permission is required regardless of whether evidence of nomination or candidacy for civil office has been filed prior to commencing active duty service or whether or not the member is an incumbent. If a member covered by the prohibition in subparagraph 4.2.1., above, became a nominee or candidate for the civil office prior to commencing active duty, the member must decline the nomination or withdraw as a candidate unless the member receives such permission.

4.3. Holding and Exercising the Functions of Civil Office Attained by Election or Appointment

4.3.1. Except as authorized by subparagraph 4.3.2., below, or otherwise provided for by law, no member on active duty may hold or exercise the functions of civil office in the U.S. Government that:

4.3.1.1. Is an elective office.

4.3.1.2. Requires an appointment by the President by and with the advice and consent of the Senate.

4.3.1.3. Is a position on the executive schedule under sections 5312 through 5317 of title 5, U.S.C. (reference (e)).

4.3.2. The prohibitions of subparagraph 4.3.1., above, do not apply to any retired regular member or Reserve member serving on active duty under a call or order to active duty that specifies a period of active duty of 270 days or less, provided there is no interference with the performance of military duties. If the call or order specifies a period of active duty of more than 270 days, the prohibitions of subparagraph 4.3.1., above, apply beginning on the first day of the active duty period.

4.3.3. A member on active duty may hold or exercise the functions of a civil office in the U.S. Government that is not described in subparagraph 4.3.1., above,

including when assigned or detailed to such office to perform such functions, provided there is no interference with military duties.

4.3.4. Except as authorized by subparagraph 4.3.5., below, or otherwise provided for by law, no member on active duty may hold or exercise the functions of civil office in the government of a State; the District of Columbia; a territory, possession, or commonwealth of the United States; or any political subdivision thereof.

4.3.5. Exceptions to the prohibitions of subparagraph 4.3.4.:

4.3.5.1. Any enlisted member may seek, hold, and exercise the functions of nonpartisan civil office as a notary public or member of a school board, neighborhood planning commission, or similar local agency, provided that the office is held in a non-military capacity and there is no interference with the performance of military duties.

4.3.5.2. Any officer may seek, hold, and exercise the functions of a nonpartisan civil office on an independent school board that is located exclusively on a military reservation, provided that the office is held in a non-military capacity and there is no interference with the performance of military duties.

4.3.5.3. The prohibitions on holding and exercising the functions of civil office of subparagraph 4.3.4., above, do not apply to any retired regular member or Reserve member serving on active duty under a call or order to active duty that specifies a period of active duty of 270 days or less, provided the civil office is held in a non-military capacity and there is no interference with the performance of military duties. If the call or order specifies a period of active duty of more than 270 days, the prohibitions of subparagraph 4.3.4., above, apply beginning on the first day of the active duty period.

4.3.5.4. The prohibition on holding civil office does not apply to any retired regular member or Reserve member serving on active duty under a call or order to active duty for a period in excess of 270 days, unless:

4.3.5.4.1. The holding of such office is prohibited under the laws of that State; the District of Columbia; a territory, possession, or commonwealth of the United States; or any political subdivision thereof; or

4.3.5.4.2. The Secretary concerned determines that the holding of such office interferes with the performance of military duties.

4.3.6. Members to whom the exception of subparagraph 4.3.5.4., above, applies may not exercise the functions of their civil office while on active duty.

4.4. Actions When Prohibitions Apply

4.4.1. Members affected by the prohibitions against being a nominee or candidate for, holding, or exercising the functions of a civil office (subparagraphs 4.2.1., 4.3.1., or 4.3.4., above) may request retirement (if eligible), discharge, or release from active duty, and the Secretary concerned may approve these requests consistent with the needs of the Service unless the member is:

4.4.1.1. Obligated to fulfill an active duty service commitment.

4.4.1.2. Serving or has been issued orders to serve afloat or in an area that is overseas, remote, a combat zone, or a hostile fire pay area.

4.4.1.3. Ordered to remain on active duty while the subject of an investigation or inquiry.

4.4.1.4. Accused of an offense under the Uniform Code of Military Justice, 10 U.S.C. chapter 47 (reference (b)), or serving a sentence or punishment for such offense.

4.4.1.5. Pending other administrative separation action or proceedings.

4.4.1.6. Indebted to the United States.

4.4.1.7. In a Reserve component and serving involuntarily under a call or order to active duty that specifies a period of active duty of more than 270 days during a period of declared war or national emergency, or other period when a unit or individual of the National Guard or other Reserve component has been involuntarily called or ordered to active duty as authorized by law.

4.4.1.8. In violation of this Directive or an order or regulation prohibiting such member from assuming or exercising the functions of civil office.

4.4.2. Subparagraph 4.4.1., above, does not preclude a member's involuntary discharge or release from active duty.

4.4.3. No actions undertaken by a member in carrying out assigned military duties shall be invalidated solely by virtue of such member having been a candidate or nominee for a civil office in violation of the prohibition of subparagraph 4.2.1., above, or held or exercised the functions of a civil office in violation of the prohibitions of subparagraphs 4.3.1. or 4.3.4., above.

4.4.4. A member who violates any of the prohibitions in subparagraphs 4.1.2., 4.2.1., 4.3.1., or 4.3.4., or enclosure 3, of this Directive may be subject to disciplinary or adverse administrative action under Service regulations.

4.5. All members of the Armed Forces on active duty engaging in political activities shall follow the examples and requirements in enclosure 3.

5. RESPONSIBILITIES

5.1. The Under Secretary of Defense (Personnel and Readiness) shall administer this Directive.

5.2. The Secretaries of the Military Departments shall issue appropriate implementing documents for their respective Departments.

5.3. The Chief, National Guard Bureau shall issue policy guidance similar to that included in this Directive that is applicable to members of the National Guard serving in a full-time National Guard duty status.

6. EFFECTIVE DATE

This Directive is effective immediately.



Paul Wolfowitz
Deputy Secretary of Defense

Enclosures - 3

- E1. References, continued
- E2. Definitions
- E3. Examples and Additional Requirements

DODD 1344.10, August 2, 2004

E1. ENCLOSURE 1

REFERENCES, continued

- (e) Sections 5312 through 5317 of title 5, United States Code
- (f) DoD Directive 1334.1, "Wearing of the Uniform," May 17, 2004
- (g) Section 441a of title 2, United States Code
- (h) Section 607 of title 18, United States Code

E2. ENCLOSURE 2

DEFINITIONS

E2.1.1. Active Duty. Full-time duty in the active military service of the United States regardless of duration or purpose, including:

E2.1.1.1. Full-time training duty;

E2.1.1.2. Annual training duty; and

E2.1.1.3. Attendance, while in the active military service, at a school designated as a Service school by law or by the Secretary of the Military Department concerned.

E2.1.2. Armed Forces. The U.S. Army, the Navy, the Air Force, the Marine Corps, and the Coast Guard, including their Reserve components.

E2.1.3. Civil Office. A non-military office involving the exercise of the powers or authority of civil government, to include elective and appointive office in the U.S. Government, a U.S. territory or possession, State, county, municipality, or official subdivision thereof. This term does not include a non-elective position as regular or reserve member of a civilian law enforcement, fire, or rescue squad.

E2.1.4. Nonpartisan Political Activity. Activity supporting or relating to candidates not representing, or issues not specifically identified with, national or State political parties and associated or ancillary organizations. Issues relating to constitutional amendments, referendums, approval of municipal ordinances, and others of similar character are not considered under this Directive as specifically being identified with national or State political parties.

E2.1.5. Partisan Political Activity. Activity supporting or relating to candidates representing, or issues specifically identified with, national or State political parties and associated or ancillary organizations.

E2.1.6. Secretary Concerned. Defined in 10 U.S.C. 101(9) (reference (b)).

E3. ENCLOSURE 3

EXAMPLES AND ADDITIONAL REQUIREMENTS

E3.1. PURPOSE

This enclosure provides examples of permissible and prohibited political activities and other requirements for implementing this Directive.

E3.2. EXAMPLES OF PERMISSIBLE POLITICAL ACTIVITIES

A member on active duty may:

E3.2.1. Register, vote, and express a personal opinion on political candidates and issues, but not as a representative of the Armed Forces.

E3.2.2. Promote and encourage other military members to exercise their voting franchise, if such promotion does not constitute an attempt to influence or interfere with the outcome of an election.

E3.2.3. Join a political club and attend its meetings when not in uniform. See Directive 1334.1 (reference (f)).

E3.2.4. Serve as an election official, if such service is not as a representative of a partisan political party, does not interfere with military duties, is performed when not in uniform, and has the prior approval of the Secretary concerned or the Secretary's designee.

E3.2.5. Sign a petition for specific legislative action or a petition to place a candidate's name on an official election ballot, if the signing does not obligate the member to engage in partisan political activity and is done as a private citizen and not as a representative of the Armed Forces.

E3.2.6. Write a letter to the editor of a newspaper expressing the member's personal views on public issues or political candidates, if such action is not part of an organized letter-writing campaign or a solicitation of votes for or against a political party or partisan political cause or candidate.

E3.2.7. Make monetary contributions to a political organization, party, or committee favoring a particular candidate or slate of candidates, subject to the limitations under 2 U.S.C. 441a, 18 U.S.C. 607 (references (g) and (h)), and other applicable law.

E3.2.8. Display a political sticker on the member's private vehicle.

E3.2.9. Attend partisan and nonpartisan political meetings or rallies as a spectator when not in uniform.

E3.3. EXAMPLES OF PROHIBITED POLITICAL ACTIVITIES

In accordance with the statutory restrictions in 10 U.S.C. 973(b) (reference (b)) and references (g) and (h), and the policies established in section 4., above, of this Directive, a member on active duty shall not:

E3.3.1. Use official authority or influence to: interfere with an election, affect the course or outcome of an election, solicit votes for a particular candidate or issue, or require or solicit political contributions from others.

E3.3.2. Be a candidate for civil office in Federal, State, or local government, except as authorized in paragraph 4.2., above, of this Directive, or engage in public or organized soliciting of others to become partisan candidates for nomination or election to civil office.

E3.3.3. Participate in partisan political management, campaigns, or conventions (except as a spectator when not in uniform), or make public speeches in the course thereof.

E3.3.4. Make a contribution to another member of the Armed Forces or a civilian officer or employee of the United States for the purpose of promoting a political objective or cause, including a political campaign.

E3.3.5. Solicit or receive a contribution from another member of the Armed Forces or a civilian officer or employee of the United States for the purpose of promoting a political objective or cause, including a political campaign.

E3.3.6. Allow or cause to be published partisan political articles signed or written by the member that solicits votes for or against a partisan political party, candidate, or cause.

E3.3.7. Serve in any official capacity or be listed as a sponsor of a partisan political club.

E3.3.8. Speak before a partisan political gathering, including any gathering that promotes a partisan political party, candidate, or cause.

E3.3.9. Participate in any radio, television, or other program or group discussion as an advocate for or against of a partisan political party, candidate, or cause.

E3.3.10. Conduct a political opinion survey under the auspices of a partisan political group or distribute partisan political literature.

E3.3.11. Use contemptuous words against the officeholders described in 10 U.S.C. 888 (reference (b)), or participate in activities proscribed by references (c) and (d).

E3.3.12. Perform clerical or other duties for a partisan political committee during a campaign or on an election day.

E3.3.13. Solicit or otherwise engage in fundraising activities in Federal offices or facilities, including military reservations, for a partisan political cause or candidate.

E3.3.14. March or ride in a partisan political parade.

E3.3.15. Display a large political sign, banner, or poster (as distinguished from a bumper sticker) on the top or side of a private vehicle.

E3.3.16. Participate in any organized effort to provide voters with transportation to the polls if the effort is organized by, or associated with, a partisan political party or candidate.

E3.3.17. Sell tickets for, or otherwise actively promote, political dinners and similar fundraising events.

E3.3.18. Attend partisan political events as an official representative of the Armed Forces.

E3.4. POLITICAL ACTIVITIES NOT EXPRESSLY PERMITTED OR PROHIBITED

Some activities not expressly prohibited may be contrary to the spirit and intent of section 4. of this Directive or section E3.3. of this enclosure. In determining whether an activity violates the traditional concept that Service members should not engage in partisan political activity, rules of reason and common sense shall apply. Any activity that may be viewed as associating the Department of Defense or the Department of Homeland Security, in the case of the Coast Guard, or any component of these Departments directly or indirectly with a partisan political activity shall be avoided.

E3.5. LOCAL NONPARTISAN POLITICAL ACTIVITIES

This Directive does not preclude participation in local nonpartisan political campaigns, initiatives, or referendums. A member taking part in local nonpartisan political activity, however, shall not:

E3.5.1. Wear a uniform or use any Government property or facilities while participating.

E3.5.2. Allow such participation to interfere with, or prejudice, the member's performance of military duties.

E3.5.3. Engage in conduct that in any way may imply that the Department concerned or any component of such Department has taken an official position on, or is otherwise involved in, the local political campaign or issue.

E3.6. ADDITIONAL REQUIREMENTS

Members of the Armed Forces on active duty engaging in permissible political activities shall:

E3.6.1. Give full time and attention to the performance of military duties during prescribed duty hours.

E3.6.2. Avoid any outside activities that may be prejudicial to the performance of military duties or are likely to bring discredit upon the Armed Forces.

E3.6.3. Refrain from participating in any political activity while in military uniform, as proscribed by reference (f), or using Government facilities or resources for furthering political activities.

APPENDIX D

1967 WL 4286 (CMA), 37 C.M.R. 429, 17 USCMA 165

Court of Military Appeals.

United States, Appellee

v.

Henry H. Howe , Jr., Second Lieutenant, U. S. Army, Appellant.

No. 19,846.

August 4, 1967.

On petition for reconsideration. CM 413739, reported below at 37 CMR 555. Petition denied.
Conduct, etc. §§ 43, 48 - constitutionality of Art 88 of Code.

1. Article 88 of the Uniform Code of Military Justice proscribing the use by commissioned officers of contemptuous words against the President of the United States or other designated public officials does not violate the First Amendment to the United States Constitution.

Conduct, etc. §§ 43, 48 - Art 133 as not unconstitutional restriction on freedom of expression.

2. A charge under Art 133 of the Code charging the accused with conduct unbecoming an officer by participating in a public demonstration by carrying a sign reading "Let's have more than a choice between petty ignorant facists in 1968" on one side and on the other side "End Johnson's facist aggression in Viet Nam", was not in violation of the First Amendment. Art 133 proscribing conduct unbecoming an officer affronts no constitutional concept and, as applied to an officer's freedom of expression, it constitutes a constitutionally permissible restraint on the abuse of that right.

Conduct, etc. §§ 43, 48 - Art 133 as covering off-duty activities.

3. Notwithstanding the provisions of AR 600-20, para 46.1, relating to participation by Army personnel in public demonstrations, insofar as an abuse of the right to freedom of expression is concerned, an officer's off-duty activities fall within Art 133 of the Code. Thus, a specification charging the accused with conduct unbecoming an officer by participating in a public demonstration by carrying a sign derogatory of the President was not defective in not being limited to acts in the accused's official capacity.

Conduct, etc. §§ 43, 48 - definiteness of Art 88 of Code.

4. Article 88 of the Code, proscribing a commissioned officer's use of contemptuous words against the President of the United States or other specified public officials, is not so vague and uncertain as to violate the due process clause of the Fifth Amendment. Tested by all applicable standards, the Article meets the constitutional norm as to certainty.

Conduct, etc. §§ 43, 48 - use of contemptuous words against President - intent as not element of offense.

5. Assuming the accused's participation in a public demonstration carrying a sign derogatory of the President constituted participation in a political discussion, the law officer at his trial on charges of using contemptuous words against the President in violation of Art 88 of the Code did

not err in failing to instruct, sua sponte, that if the court found the alleged contemptuous words to have been uttered in the course of a political discussion, it had to find the accused intended these words to be personally disrespectful. Neither the Code nor the Manual make intent an element of the offense. Thus, the law officer did not err in failing to give a sua sponte instruction concerning intent.

Conduct, etc. §§ 43, 48 - using contemptuous words against President - maximum confinement.

6. Where the accused was convicted of using contemptuous words against the President in violation of Art 88 and conduct unbecoming an officer in violation of Art 133, both offenses having been committed by participating in a public demonstration by carrying a sign reading "Let's have more than a choice between petty ignorant facists in 1968" on one side and "End Johnson's facist aggression in Viet Nam" on the other side, it was held that the most closely analogous offense listed in the Table of Maximum Punishments was that of uttering disloyal statements in violation of Art 134 and, thus, that the offenses alleged and found, treated as multiplicitous for punishment purposes, were punishable by a maximum confinement of three years.

Conduct, etc. §§ 43, 48 - use of contemptuous words against President - instructions on determination of contemptuous nature - words contemptuous per se.

7. An accused convicted of using contemptuous words against the President by participating in a public demonstration carrying a sign reading "Let's have more than a choice between petty ignorant facists in 1968" on one side and "End Johnson's facist aggression in Viet Nam" on the other side could not have been prejudiced by the instructions on the test to be applied in determining the contemptuous nature of the words used since the words used were contemptuous per se.

Review § 37 - prejudice from presence of board of review member who had expressed opinion as to specifications prior to appointment to board.

8. The accused could not have been prejudiced by the fact that one of the members of the board of review, prior to his appointment to the board and while serving as a senior officer in the appellate defense division, had been consulted by the accused's appellate defense counsel and, in response to a question by counsel, he had expressed the opinion that the specifications were legally sufficient where the specifications were in fact legally sufficient and there was no indication, or even the claim, that the member was personally biased, but only the contention that there was the appearance of a predisposition for one litigant over the other.

*431 **167 Mrs. Eleanor H. Norton and Captain Kenneth J. Stuart argued the cause for Appellant, Accused.

Captain Maurice Jay Kutner argued the cause for Appellee, United States. With him on the brief were Colonel Peter S. Wondolowski, Lieutenant Colonel David Rarick, and Captain Anthony L. Tersigni.

Opinion of the Court

KILDAY, Judge:

Petitioner was arraigned before a general court-martial convened by the Commanding General, United States Army Air Defense Center at Fort Bliss, Texas. He was charged with using contemptuous words against the President of the United States and conduct unbecoming an officer and a gentleman, in violation of Articles 88 and 133, Uniform Code of Military Justice, 10 USC §§ 888 and 933, respectively. He was also charged, originally, with public use of language disloyal to the United States with design to promote disloyalty and disaffection among the troops and civilian populace, in violation of Article 134, Uniform Code of Military Justice, 10 USC § 934. As to this last charge, the defense motion to dismiss was sustained by the law officer. He was convicted of the two charges, first above-mentioned, and sentenced to dismissal, total forfeitures, and confinement at hard labor for two years. The convening authority reduced the period of confinement to one year and otherwise approved the sentence.^{FN1} A board of review in the office of the Judge Advocate General of the Army affirmed the findings and sentence.

FN1 Three months and two days after his trial he was released from confinement under commandant's parole.

In due time, petitioner filed with this Court, pursuant to Article 67(b) (3), Uniform Code of Military Justice, 10 USC § 867, a petition for review. Upon consideration of that petition by this Court, the same was denied. Thereupon, petitioner filed with this Court his petition for reconsideration. This Court, by order, directed that the petition for reconsideration be set for oral argument and that briefs be filed by counsel for both parties. Briefs having been filed and oral argument held, we proceed to the disposition of the petition for reconsideration.

The specification under the charge of violation of Article 88, *supra*, reads as follows:

*432 "In that Second Lieutenant Henry H. Howe, Junior, U. S. Army, Headquarters Company, 31st Engineer Battalion, Fort Bliss, Texas, did, in the vicinity of San Jacinto Plaza, El Paso, Texas, on or about 6 November 1965, wrongfully and publicly use contemptuous words against the President of the United States, Lyndon B. Johnson, by carrying and displaying to the public a sign reading as follows, to wit: 'LET'S HAVE MORE THAN A CHOICE BETWEEN PETTY IGNORANT FACISTS IN 1968' and on the other side of the sign the words 'END JOHNSON'S FACIST AGRESSION IN VIET NAM,' or words to that effect."

The specification under the charge of violation of Article 133, *supra*, reads as follows:

**168 "In that Second Lieutenant Henry H. Howe, Junior, U. S. Army, Headquarters Company, 31st Engineer Battalion, Fort Bliss, Texas, did in the vicinity of San Jacinto Plaza, El Paso, Texas, on or about 6 November 1965, wrongfully take part in a public demonstration by carrying and displaying to the public a sign reading as follows, to wit: 'LET'S HAVE MORE THAN A CHOICE BETWEEN PETTY IGNORANT FACISTS IN 1968' and on the other side the words 'END JOHNSON'S FACIST AGRESSION IN VIET NAM,' or words to that effect, his acts constituting conduct unbecoming an officer and gentleman in the United States Army."

Petitioner presents that the record reveals that a group of professors and students from a state college at El Paso, Texas, intending to "demonstrate against American policy," requested permission from the City Council of that city to hold a sidewalk demonstration in San Jacinto Plaza, but that the council initially denied permission. Thereafter, "pressure" was brought on the City Council which persuaded its members that there was a constitutional right to demonstrate. The City Attorney then advised the council that under the Constitution no permission was necessary for a group to hold a sidewalk demonstration. Petitioner also points out that one of the

professors of the above-mentioned group testified that the major purpose of the demonstration was to publicize "the other position in Vietnam," but after the City Council denied permission to demonstrate, the rights guaranteed under the First and Fourteenth Amendments became a "second point" of the demonstration.

We note that the record of trial reveals that the proposal to demonstrate had been a source of controversy for two weeks preceding the demonstration held on November 6, 1965. This controversy had, during that period, consumed much space in the local press and in broadcasts on local radio and television stations. At the time and place set for the demonstration, a crowd of some 2,000 persons had assembled and the picket line was met with pro-Vietnam sentiment, including spectators with "Win in Vietnam" stickers pasted on their foreheads, and American Legionnaires, distinctively attired, passing out small United States flags. There was a counter-demonstration, and "cat calls and comments" were aimed at the demonstrators by spectators but otherwise the demonstration was peaceful.

The Assistant Chief of Police of El Paso testified that at the time of the demonstration he was a police captain in charge of the area of demonstration and had a force of thirty-three policemen stationed in the immediate vicinity of the park, with a reserve force one block away to preclude any violence which might occur or could occur. It also appears from the record that military policemen from the Provost Marshal's Office, Fort Bliss, Texas, were at the scene to aid the civilian police concerning any military personnel in uniform that might be involved in the demonstration by returning them to Fort Bliss.

The record further reveals that some twelve demonstrators walked in line about the park carrying signs reading, "let's get our boys out of Viet Nam," "get out of Viet Nam," "peace in Viet Nam," and "would Jesus carry a draft card." The demonstration was photographed and recorded on *433 **169 film by the El Paso Police Department and these photographs were admitted in evidence and the film projected for the court-martial. The demonstration was recorded on motion picture film by at least two of the local television stations and the same were broadcast by those stations.

The petitioner is a graduate of the University of Colorado where he majored in political science. While a student, he voluntarily participated in the Reserve Officers' Training Corps, and upon graduation he accepted a commission as a second lieutenant in the United States Army Reserve. He was ordered to active duty under that commission and had been on duty approximately twelve months at the time of this occurrence.

Petitioner was not a member of the group of professors and students which arranged for, and organized, the demonstration in San Jacinto Plaza. It appears as if he was not known to the members of that group. Prior to their assembly, he was observed at the site of the demonstration holding in his hand a rolled piece of cardboard. As the group began to march in its picket line, he joined the same at the rear thereof, unrolled the cardboard which he carried and held it before him as he walked, reversing the same from time to time so that each side was visible to the assembled crowd. On one side the placard contained the lettering: "LET'S HAVE MORE THAN A 'CHOICE' BETWEEN PETTY, IGNORANT, FACISTS in 1968"; and on the other side the lettering: "END JOHNSON'S FACIST AGRESSION IN VIETNAM."

One of the military policemen present testified he recognized three or four other servicemen at the scene. There is no means of knowing the number of other servicemen who may have been present, not in uniform, and not identified by the witness; nor the number of servicemen who

may have seen the petitioner marching, on the films broadcast by the television stations.

In his initial petition for review, petitioner assigned the following as errors:

1. The charges against appellant violate the First Amendment to the Constitution.
2. Articles 88 and 133 are so vague and uncertain that they violate the Due Process clause of the Fifth Amendment.
3. The charge under Article 133 fails to state an offense.
4. The law officer erred to the substantial prejudice of the appellant in failing to instruct, sua sponte, that if the court-martial found the allegedly contemptuous words to have been uttered in the course of a political discussion, then it had to find that appellant intended them to be personally disrespectful.
5. Appellant was substantially prejudiced by the law officer's ruling that the maximum sentence for the charged offenses included confinement at hard labor for three years.
6. The law officer erred to the substantial prejudice of the appellant by instructing the court-martial, over defense objection, that in determining whether the words uttered by appellant were contemptuous of the President the court-martial "should apply the test of how the words were understood and what they were taken to mean by the persons who saw them, or some of them."
7. The appellant was prejudiced in his appeal before the board of review by Lieutenant Colonel Jacob Hagopian's participation in the oral argument and decision of the instant case.

Article 88, Uniform Code of Military Justice, 10 USC § 888, reads as follows:

"Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of the Treasury, or the Governor or legislature of any State, Territory, Commonwealth, *434 **170 or possession in which he is on duty or present shall be punished as a court-martial may direct."

The petitioner contends that this Article and the charge laid under it violate the Bill of Rights and the First Amendment thereof.

We note that this provision was not new to military law when it was adopted as a part of the Uniform Code of Military Justice. Actually, this provision, and its precursors, are older than the Bill of Rights, older than the Constitution, and older than the Republic itself.

The British Articles of War of 1765, in force at the beginning of our Revolutionary War, provided for the court-martial of any officer or soldier who presumed to use traitorous or disrespectful words against "the Sacred Person of his Majesty, or any of the Royal Family"; and of any officer or soldier who should "behave himself with Contempt or Disrespect towards the General, or other Commander in Chief of Our Forces, or shall speak Words tending to his Hurt or Dishonour."^{FN2}

FN2 The British Articles of War of 1765, section II, provided:

"ART. I.

"Whatsoever Officer or Soldier shall presume to use traitorous or disrespectful Words against the Sacred Person of his Majesty, or any of the Royal Family; if a Commissioned

Officer, he shall be cashiered; if a Non-commissioned Officer or Soldier, he shall suffer such Punishment as shall be inflicted upon him by the Sentence of a Court-martial.

“ART. II.

“Any Officer or Soldier who shall behave himself with Contempt or Disrespect towards the General, or other Commander in Chief of Our Forces, or shall speak Words tending to his Hurt or Dishonour, shall be punished according to the Nature of his Offence, by the Judgment of a Court-martial.” [Winthrop's Military Law and Precedents, 2d ed, 1920 Reprint, at page 932.]

The Articles of War adopted by the Continental Congress on June 30, 1775, revised the British language to adjust the same to the new concept of “Continental Forces” and made punishable by court-martial the act of any officer or soldier who behaved himself with “contempt or disrespect toward the general or generals, or commanders in chief of the continental forces, or shall speak false words, tending to his or their hurt or dishonor.”^{FN3}

FN3 The Articles of War adopted by the Continental Congress on June 30, 1775, contained the following provision:

“IV. Any officer or soldier, who shall behave himself with contempt or disrespect towards the general or generals, or commanders in chief of the continental forces, or shall speak false words, tending to his or their hurt or dishonor, shall be punished according to the nature of his offence, by the judgment of a general court-martial.” [Winthrop's Military Law and Precedents, 2d ed, 1920 Reprint, at pages 953-954.]

The Declaration of Independence, having been signed, the Articles of Confederation and Perpetual Union, having been reported to the Continental Congress,^{FN4} and the confederacy known as “The United States of America,” having begun to emerge with the major authority residing in the “United States of America, in Congress assembled,” the Continental Congress, on September 20, 1776, adopted new Articles of War making punishable by court-martial the conduct of any officer or soldier who “presume to use traitorous or disrespectful words against the authority of the United States in Congress assembled, or the legislature of any of the United States in which he may be quartered”; and of any officer or soldier, “who shall behave himself with contempt or disrespect towards the general, or other commander-in-chief of the forces of *435 **171 the United States, or shall speak words tending to his hurt or dishonor.”^{FN5}

FN4 The Articles of Confederation, by their terms, required approval of all the States. Maryland did not approve until March 1, 1781; therefore, the new nation acted practically throughout the Revolutionary War by general agreement only.

FN5 The Articles of War adopted by the Continental Congress on September 20, 1776, contained the following provisions:

“Section II.

“Art. 1. Whatsoever officer or soldier shall presume to use traitorous or disrespectful words against the authority of the United States in Congress assembled, or the legislature of any of the United States in which he may be quartered, if a commissioned officer, he

shall be cashiered; if a non-commissioned officer or soldier, he shall suffer such punishment as shall be inflicted upon him by the sentence of a court-martial.

“Art. 2. Any officer or soldier who shall behave himself with contempt or disrespect towards the general, or other commander-in-chief of the forces of the United States, or shall speak words tending to his hurt or dishonor, shall be punished according to the nature of his offence, by the judgment of a court-martial.” [Winthrop's Military Law and Precedents, 2d ed, 1920 Reprint, at page 961.]

The first session of the First Congress adopted a temporary provision, to remain in effect until the end of the next session of Congress, expressly extending the rules and Articles of War which had been enacted by the United States in Congress assembled. The second session of the First Congress adopted permanent legislation expressly extending those rules and Articles of War.^{FN6}

FN6 Act of September 29, 1789, section 4, First Congress, Session I, 1 Stat 95; Act of April 30, 1790, section 13, First Congress, Session II, 1 Stat 119, 121.

On December 15, 1791, the President advised the Congress that the required three-fourths of the States had ratified the amendments constituting the Bill of Rights. Thereafter, and on April 10, 1806, the Congress enacted new Articles of War and included therein the following provision:

“ART. 5. Any officer or soldier who shall use contemptuous or disrespectful words against the President of the United States, against the Vice-President thereof, against the Congress of the United States, or against the Chief Magistrate or Legislature of any of the United States, in which he may be quartered, if a commissioned officer, shall be cashiered, or otherwise punished, as a court-martial shall direct; if a noncommissioned officer or soldier, he shall suffer such punishment as shall be inflicted on him by the sentence of a court-martial.” [Act of April 10, 1806, 2 Stat 359, 360. Text included in Winthrop's Military Law and Precedents, 2d ed, 1920 Reprint, at page 976.]

With some change in language, the last quoted article of the Articles of War of 1806 was reenacted in the Articles of War adopted by the Congress on June 22, 1874.^{FN7} On August 29, 1916,^{FN8} and again in 1920,^{FN9} substantially the same provision was reenacted *436 **172 by the Congress. It was not changed in 1948 by the Elston Act, which revised the Articles of War after the termination of World War II.^{FN10} And, finally, it was reenacted as Article 88 of the Uniform Code of Military Justice, supra. Act of May 5, 1950, 64 Stat 107, 135; Act of August 10, 1956, 70A Stat 36, 67. Now, however, it applies to officers only; that portion of previous Articles relating to “other persons subject to military law” having been deleted.

FN7 The Articles of War adopted by Congress on June 22, 1874, contained the following provision:

“ART. 19.-Any officer who uses contemptuous or disrespectful words against the President, the Vice-President, the Congress of the United States, or the chief magistrate or legislature of any of the United States in which he is quartered, shall be dismissed from the service, or otherwise punished, as a court-martial may direct. Any soldier who so offends shall be punished as a court-martial may direct.” [Revised Statutes, section 1342, Article 19 (1874). Text included in Winthrop's Military Law and Precedents, 2d ed, 1920 Reprint, page 987.]

FN8 The Articles of War adopted by Congress on August 29, 1916, contained the

following provision:

“ART. 62. DISRESPECT TOWARD THE PRESIDENT, VICE PRESIDENT, CONGRESS, SECRETARY OF WAR, GOVERNORS, LEGISLATURES.-Any officer who uses contemptuous or disrespectful words against the President, Vice President, the Congress of the United States, the Secretary of War, or the governor or legislature of any State, Territory, or other possession of the United States in which he is quartered shall be dismissed from the service or suffer such other punishment as a court-martial may direct. Any other person subject to military law who so offends shall be punished as a court-martial may direct.” [Act of August 29, 1916, 39 Stat 619, 660; Manual for Courts-Martial, U. S. Army, 1917, page 318.]

FN9 The Articles of War adopted by Congress in 1916 and amended June 4, 1920, 41 Stat 759, contained the following provision:

“ART. 62. DISRESPECT TOWARD THE PRESIDENT, VICE PRESIDENT, CONGRESS, SECRETARY OF WAR, GOVERNORS, LEGISLATURES.-Any officer who uses contemptuous or disrespectful words against the President, Vice President, the Congress of the United States, the Secretary of War, or the governor or legislature of any State, Territory, or other possession of the United States in which he is quartered shall be dismissed from the service or suffer such other punishment as a court-martial may direct. Any other person subject to military law who so offends shall be punished as a court-martial may direct.” [Act of June 4, 1920, 41 Stat 759, 801; Manual for Courts-Martial, U. S. Army, 1921, page 518.]

FN10 The Elston Act, Public Law 759, 89th Congress, 62 Stat 604, 627, approved June 24, 1948.

The First Amendment to the Constitution of the United States provides:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

Of it, the Supreme Court has said:

“At the outset we reject the view that freedom of speech and association . . . as protected by the First and Fourteenth Amendments, are ‘absolutes,’ not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment.” [Konigsberg v State Bar of California, 366 US 36, 49; 6 L ed 2d 105, 116; 81 S Ct 997 (1961).]

“ . . . We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counseling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech.” [Justice Holmes in Frohwerk v United States, 249 US 204, 63 L ed 561, 564, 39 S Ct 249 (1919).]

“ . . . But the character of every act depends upon the circumstances in which it is done. Aikens v Wisconsin, 195 US 194, 205, 206, 49 L ed 154, 159, 160, 25 Sup Ct Rep 3. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre, and causing a panic. . . . The question in every case is whether the words used are used in such

circumstances and are not such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." [Justice Holmes in *Schenck v United States*, 249 US 47, 63 L ed 470, 473-474, 39 S Ct 247 (1919).]

"... Speech is not an absolute, above and beyond control of the legislature when its judgment, subject to review here, is that certain kinds of speech are so undesirable as to warrant criminal sanction. Nothing is more certain in modern society than the principle that there are no absolutes, that a name, a *437 **173 phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature. See *Douds*, 339 US at 397, 94 L ed 942, 70 S Ct 674. To those who would paralyze our Government in the face of impending threat by encasing it in a semantic straightjacket we must reply that all concepts are relative." [Chief Justice Vinson in *Dennis v United States*, 341 US 494, 508, 95 L ed 1137, 1152, 71 S Ct 857 (1951).]

The following is from the text in "Constitution of the United States of America," Revised and Annotated, 1963.^{FN11}

FN11 Prepared by the Legislative Reference Service, Library of Congress, Edward S. Corwin, Editor of 1952 Edition, Norman J. Small, Editor, and Lester S. Jayson, Supervisory Editor of 1964 Edition, U. S. Government Printing Office, 1964.

"The Federal Government may punish utterances which obstruct its recruiting or enlistment service, cause insubordination in the armed forces, encourage resistance to government in the prosecution of war, or impede the production of munitions and other essential war material. The only issue which has divided the [Supreme] Court with regard to such speech has been the degree of danger which must exist before it may be punished. The decision in *Dennis v United States* diminishes, if it does not eliminate, this issue." [Page 895. Emphasis supplied. Cf. *New York Times Co. v Sullivan*, 376 US 254, 11 L ed 2d 686, 84 S Ct 710 (1964), with Annotation: Right to Free Speech, 11 L ed 2d 1116.]

In *Schenck* and *Frohwerk*, both *supra*, and also in *Debs v United States*, 249 US 211, 63 L ed 566, 39 S Ct 252 (1919), the defendants were charged with conspiracy to violate the Espionage Act of June 15, 1917, by causing and attempting to cause insubordination in the military forces and to obstruct the recruiting and enlistment service when the United States was at war with the German Empire. The proof consisted of making speeches, printing and circulating bulletins, and the printing of a newspaper. The Supreme Court, although announcing the "clear and present danger" doctrine (*Schenck*), affirmed those convictions. The proof in *Schenck v United States*, *supra*, in which the doctrine was announced and the conviction sustained, was of such a nature as to cause Chief Justice Vinson to observe in *Dennis v United States*, *supra*:

"... The objectionable document denounced conscription and its most inciting sentence was, 'You must do your share to maintain, support and uphold the rights of the people of this country.' 249 US at 51. Fifteen thousand copies were printed and some circulated. This insubstantial gesture toward insubordination in 1917 during war was held to be a clear and present danger of bringing about the evil of military insubordination." [341 US 494, 504, 95 L ed 1137, 1150, 71 S Ct 857 (1951).]

The evil which Article 88 of the Uniform Code, *supra*, seeks to avoid is the impairment of discipline and the promotion of insubordination by an officer of the military service in using contemptuous words toward the Chief of State and the Commander-in-Chief of the Land and

Naval Forces of the United States. Under the British Articles of War of 1765, the precursor to Article 88, Uniform Code of Military Justice, *supra*, was included with the offense of sedition under Section II thereof, entitled, "Mutiny." It is similarly separated in the American Articles of War 1776, being grouped with the offenses of sedition and mutiny. Winthrop's Military Law and Precedents, 2d ed, 1920 Reprint, at pages 932 and 961. We need not determine whether a state of war presently exists. We do judicially know that hundreds of thousands of members of our military forces are committed to combat in Vietnam, casualties among our forces are heavy, and thousands are being recruited, or drafted, into our armed *438 **174 forces. That in the present times and circumstances such conduct by an officer constitutes a clear and present danger to discipline within our armed services, under the precedents established by the Supreme Court, seems to require no argument.

The offense denounced by Article 88, *supra*, was an offense in the British forces at the beginning of our Revolutionary War and was readopted by the Continental Congress. It is significant that it was reenacted by the First Congress of which fifteen of the thirty-nine signers of the Constitution were members, including James Madison, the author of the Bill of Rights. *United States v Culp*, 14 USCMA 199, 211, 14 CMR 411. It is of even more significance that this provision was readopted by the Ninth Congress in 1806, after the Bill of Rights had been adopted and became a part of the Constitution. This action of Congress constituted a contemporary construction of the Constitution and is entitled to the greatest respect. *United States v Culp*, *supra*.

Speaking of a provision of this identical statute of 1806, the Supreme Court said in *Ex parte Quirin*, 317 US 1, 41, 87 L ed 3, 20, 63 S Ct 2 (1942):

"... This enactment must be regarded as a contemporary construction of both Article 3, § 2, and the Amendments as not foreclosing trial by military tribunals, without a jury, of offenses against the law of war committed by enemies not in or associated with our Armed Forces. It is a construction of the Constitution which has been followed since the founding of our government, and is now continued in the 82d Article of War. Such a construction is entitled to the greatest respect."

Since our decision in *United States v Culp*, *supra*, the Supreme Court has had occasion to again consider the question of contemporary construction of the Constitution. Growing out of the dispute occasioned by the order for the integration of the University of Mississippi, Governor Ross R. Barnett was cited for contempt and demanded trial by jury. In holding that he was not entitled to trial by jury, the Supreme Court said, in *United States v Barnett*, 376 US 681, 693, 12 L ed 2d 23, 32, 84 S Ct 984 (1964):

"... Indeed, the short answer to this contention is the Judiciary Act of 1789 which provided that the courts of the United States shall have power to 'punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause of hearing before the same.' It will be remembered that this legislation was enacted by men familiar with the new Constitution. Madison urged passage of the act in the House and five of the eight members of the Senate Committee which recommended adoption, were also delegates to the Constitutional Convention of 1787. 1 Annals of Congress 18, 812-813."

[1] That Article 88, *supra*, does not violate the First Amendment is clear. This conclusion is compelled and fortified by the recent action of the Supreme Court in *United States v Barnett*, *supra*. The reenactment by the First Congress on two occasions of the previously existing Articles adopted by the Continental Congress and the action of Congress in 1806 in reenacting

the substantially identical provision, now contained in Article 88, must be regarded as contemporary construction of the constitutional provisions. On no less than six occasions since the enactment of 1806, the Congress has reenacted the provision, with little or no change, as a construction of the Constitution which has been followed since the founding of our government.

In his lecture on "The Bill of Rights and the Military," given as the third James Madison Lecture at the New York University Law Center on February 1, 1962 (37 New York University Law Review 181, 183), Chief Justice Warren stated the historical fact:

"It is significant that in our own hemisphere only our neighbor, Canada, and we ourselves have avoided rule by the military throughout*439 **175 our national existences. This is not merely happenstance. A tradition has been bred into us that the perpetuation of free government depends upon the continued supremacy of the civilian representatives of the people. To maintain this supremacy has always been a preoccupation of all three branches of our government. To strangers this might seem odd, since our country was born in war. It was the military that, under almost unbearable conditions, carried the burden of the Revolution and made possible our existence as a Nation.

"But the people of the colonies had long been subjected to the intemperance of military power. Among the grievous wrongs of which they complained in the Declaration of Independence were that the King had subordinated the civil power to the military, that he had quartered troops among them in times of peace, and that through his mercenaries he had committed other cruelties. Our War of the Revolution was, in good measure, fought as a protest against standing armies. Moreover, it was fought largely with a civilian army, the militia, and its great Commander-in-Chief was a civilian at heart. After the War, he resigned his commission and returned to civilian life. In an emotion-filled appearance before the Congress, his resignation was accepted by its President, Thomas Mifflin, who, in a brief speech, emphasized Washington's qualities of leadership and, above all, his abiding respect for civil authority. This trait was probably best epitomized when, just prior to the War's end, some of his officers urged Washington to establish a monarchy, with himself at its head. He not only turned a deaf ear to their blandishments, but his reply, called by historian Edward Channing 'possibly, the grandest single thing in his whole career,' stated that nothing had given him more painful sensations than the information that such notions existed in the army, and that he thought their proposal 'big with the greatest mischiefs that can befall my country.'

"Such thoughts were uppermost in the minds of the Founding Fathers when they drafted the Constitution. Distrust of a standing army was expressed by many. Recognition of the danger from Indians and foreign nations caused them to authorize a national armed force begrudgingly."

The Chief Justice could have added that our neighbor, Canada, and the United States are the two great English-speaking countries of the Western Hemisphere. Both nations have a long tradition based upon Anglo-Saxon jurisprudence which has consistently subordinated the military to the civilian in Government. We would surely be ill-advised to make an exception for the civilian soldier which would inevitably inure to the advantage of the recalcitrant professional military man by providing an entering wedge for incipient mutiny and sedition.

True, petitioner is a reserve officer, rather than a professional officer, but during the time he serves on active duty he is, and must be, controlled by the provisions of military law. In this instance, military restrictions fall upon a reluctant "summer soldier"; but at another time, and differing circumstances, the ancient and wise provisions insuring civilian control of the military

will restrict the "man on a white horse."

What has been written historically of Article 88 of the Code, *supra*, applies with equal force to Article 133 of the Uniform Code. This codal provision reads:

"Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct."

Article 47, Articles of War, enacted June 30, 1775^{FN12}-identical to Article 23 of the British Articles of War in *440 **176 force at the beginning of the Revolutionary War-provided for the discharge from the service of any commissioned officer convicted by a general court-martial "of behaving in a scandalous, infamous manner, such as is unbecoming the character of an officer and a gentleman." Winthrop's Military Law and Precedents, *supra*, at page 957. In this same text, it is to be found as Article 21 of the Articles of War, enacted September 20, 1776, and as Article 20 of the Articles of War, enacted May 31, 1786. Winthrop, *supra*, at pages 969, 974. The scope of this provision was thereafter enlarged by the Articles of War, enacted April 10, 1806 (2 Stat 359), for Article 83 thereof omitted the original phrase "scandalous, infamous," providing simply, "Any commissioned officer convicted before a general court-martial of conduct unbecoming an officer and a gentleman, shall be dismissed the service." Winthrop, *supra*, at page 983. In the Articles of 1874 (Revised Statutes, section 1342), Article of War 61,^{FN13} dismissal was made applicable for any conviction of an officer without regard to the trial forum, and, thereafter, of any "cadet"-by the Act of August 29, 1916, Article 95 (39 Stat 650).^{FN14} The Act of June 4, 1920, Article 95 (41 Stat 787) brought no change. Other than including "Midshipmen" within the scope of the provision and removing the mandatory punishment of dismissal, this Article has since then remained the same. See Article 133 of the Uniform Code, *supra*, Act of May 5, 1950, 64 Stat 108, 142, and the Act of August 10, 1956, 70A Stat 36, 76.

FN12 "Whatsoever commissioned officer shall be convicted before a general court-martial, of behaving in a scandalous, infamous manner, such as is unbecoming the character of an officer and a gentleman, shall be discharged from the service."
[Winthrop's Military Law and Precedents, 2d ed, 1920 Reprint, at page 957.]

FN13 "Any officer who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service." [Ibid., at page 991.]

FN14 "Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service." [Act of August 29, 1916, Article 95 (39 Stat 650, 666).]

Regardless, it is now argued that the charge founded upon this Article violates the First Amendment to the Constitution, fails to state an offense, and is so vague and uncertain that the due process clause of the Fifth Amendment is abridged.

[2] That Article 133 affronts no constitutional concept has seemingly never been in doubt. In its present form, it is not a penal statute of sweeping and improper application. *N.A.A.C.P. v Button*, 371 US 415, 9 L ed 2d 405, 83 S Ct 328 (1963). Nor is it one "applied solely to terminate the reasonable, orderly, and limited exercise of the right to protest." *Brown v Louisiana*, 383 US 131, 142, 15 L ed 2d 637, 645, 86 S Ct 719 (1966). The right to free expression is not here curtailed. Indeed, in the military, it is specifically assured by AR 600-20, paragraph 46, January 31, 1967,^{FN15} superseding, but identical to, paragraph 46.1, then applicable. In truth, Article 133 concerns only the abuse of that right. *De Jonge v Oregon*, 299 US 353, 81 L ed 278, 57 S Ct 255 (1937). No one can quarrel with the general proposition that

"freedom of expression upon public questions is secured by the First Amendment"; that this safeguard "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people"; or "that public discussion is a political duty." *New York Times Co. v Sullivan*, 376 US 254, 269, 11 L ed 2d 686, 84 S Ct 710 (1964), with Annotation: *441 **177 Right to Free Speech, 11 L ed 2d 1116. It must, on the other hand, be noted, the "search for the outer limits of that right" (*Curtis Publishing Co. v Butts*, - US -, 18 L ed 2d 1094, 87 S Ct 1975, decided June 12, 1967) has, in the main, been restricted to the civilian and not to the military community and, even then, as we have said, the right is not to be exercised totally unrestricted. *Dennis v United States*, *Schenck v United States*, *Curtis Publishing Co. v Butts*, all supra; see, also, Annotation: Right of Free Speech, supra.

FN15 "Participation in picket lines or any other public demonstrations, including those pertaining to civil rights, may imply Army sanction of the cause for which the demonstration is conducted. Such participation by members of the Army, not sanctioned by competent authority, is prohibited-

- a. During the hours they are required to be present for duty.
- b. When they are in uniform.
- c. When they are on a military reservation.
- d. When they are in a foreign country.
- e. When their activities constitute a breach of law and order.
- f. When violence is reasonably likely to result."

As long ago as 1886, the Supreme Court, in *Smith v Whitney*, 116 US 167, 186, 29 L ed 601, 607, 6 S Ct 570, recognized the worth of such a statutory limitation by refusing to order a writ of prohibition to issue when to do so "would be to declare that an officer of the Navy, who, while serving by appointment of the President as Chief of a Bureau in the Navy Department, makes contracts or payments, in violation of law, in disregard of the interests of the Government, and to promote the interests of contractors, cannot lawfully be tried by a court-martial composed of naval officers, and by them convicted of scandalous conduct, tending to the destruction of good morals and to the dishonor of the naval service." In arriving at this determination, that court first observed:

"Under the sixty-first of the Articles of War for the Government of the Army of the United States, which, omitting the words 'scandalous or infamous,' provides that 'Any officer who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service,' it is observed in the most recent treatise on military law, and supported by copious references to precedents: 'While the act charged will more usually have been committed in a military capacity, or have grown out of some military status or relation, it is by no means essential that this should have been its history. It may equally well have originated in some private transaction of the party (as a member of civil society, or as a man of business), which, while impeaching his personal honor, has involved such notoriety or publicity, or led to such just complaint to superior military authority, as to have seriously compromised his character and

position as a officer of the Army and brought scandal or reproach upon the service.' 1 Winthrop, Military Law, 1023 et seq. See also 6 Ops. Attys-Gen. 413, 417; Runkle v United States, 19 C. Cl. 396, 414." [Id., at page 185. See, also, United States v Fletcher, 148 US 84, 37 L ed 378, 13 S Ct 552 (1893), and authorities cited therein.]

Similarly, this Court wrote with regard to Article 133 of the Uniform Code, supra:

"Conduct unbecoming an officer has long been recognized as a military offense, and it is to be noted that the quoted language from the present Manual is substantially identical to the treatment given the same offense by the services under the law prior to the enactment of the Uniform Code. See Manual for Courts-Martial, U. S. Army, 1949, paragraph 182; Manual for Courts-Martial, U. S. Air Force, 1949, paragraph 182; Manual for Courts-Martial of the United States Coast Guard, 1949, article 212; Naval Courts and Boards, 1937, § 99; Manual for Courts-Martial, U. S. Army, 1928, paragraph 151; Manual for Courts-Martial, U. S. Army, 1921, paragraph 445; Manual for Courts-Martial, U. S. Army, 1917, paragraph 445. Indeed, the understanding of the nature of conduct contemplated as being unbecoming an officer and gentleman goes back even further. Thus, Colonel Winthrop, in his treatise Military Law and Precedents, 2d ed, 1920 Reprint, noted at pages 711-712:

'... To constitute therefore the conduct here denounced, the act which forms the basis of the charge must have a double significance and effect. Though it need not amount to a crime, it must offend so seriously against law, justice, morality or decorum *442 **178 as to expose to disgrace, socially or as a man, the offender, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents.'

"From the foregoing, it is evident that the essence of an Article 133 offense is not whether an accused officer's conduct otherwise amounts to an offense-although, of course, it may-but simply whether the acts meet the standard of conduct unbecoming an officer as spelled out. Manifestly this is so for, in the face of a well-defined and long-standing interpretation extant under the precursor statutes-particularly Article of War 95-Congress substantially reenacted the prior law as Article 133 of the Uniform Code, with the single exception of the punishment prescribed. See United States v Davis, 12 USCMA 576, 580, 31 CMR 162; 2 Sutherland, Statutes and Statutory Construction, § 5109 (3d ed, Horack). The same conclusion is also supported by the rationale of our recent decision in United States v Sadinsky, 14 USCMA 563, 34 CMR 343, for, if only conduct otherwise recognized as criminal were embraced by Article 133, the enactment of that statute would be rendered wholly futile and meaningless. See United States v Sadinsky, supra, 14 USCMA at page 566.

"Clearly, then, the appropriate standard for assessing criminality under Article 133 is whether the conduct or act charged is dishonorable and compromising as hereinbefore spelled out-this notwithstanding whether or not the act otherwise amounts to a crime. And this is the standard employed by this Court in previous cases where we have had occasion to consider Article 133. See United States v Gomes, 3 USCMA 232, 11 CMR 232; United States v Daggett, 11 USCMA 681, 29 CMR 497." [United States v Giordano, 15 USCMA 163, 168, 35 CMR 135.]

In short, we, too, find Article 133 of the Uniform Code, supra, a constitutionally permissible exercise of statutory restraint.

[3] By the same token, we find little merit to the defense argument that the instant specification

does not state an Article 133 offense, in that the action or behavior proscribed must be limited to the accused's "official capacity." Suffice it to again say, an officer on active duty is to a civilian and his off-duty activities do not fall outside the orbit of Article 133, AR 600-20, paragraph 46.1, notwithstanding insofar as an abuse to the right of free expression is concerned.

This conclusion is buttressed by still another portion of *Smith v Whitney*, supra, where, at page 606, the Supreme Court observed:

"Under every system of military law for the government of either land or naval forces, the jurisdiction of courts-martial extends to the trial and punishment of acts of military or naval officers which tend to bring disgrace and reproach upon the service of which they are members, whether those acts are done in the performance of military duties, or in a civil position, or in a social relation, or in private business." [Emphasis supplied.]

[4] Turning to the remaining question of constitutional import, we do not consider Article 88 so vague and uncertain on its face that it violates the due process clause of the Fifth Amendment. It has been said that the constitutional requirement of definiteness is violated by a criminal statute only if that statute fails to give a person of ordinary intelligence fair notice that his contemplated conduct is denounced by the statute. *United States v Harriss*, 347 US 612, 98 L ed 989, 996-997, 74 S Ct 808 (1954). Moreover, the Supreme Court has held that "if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might *443 **179 arise. *United States v Petrillo*, 332 US 1, 7, 91 L ed 1877, 1882, 67 S Ct 1538. Cf. *Jordan v DeGeorge*, 341 US 223, 231, 95 L ed 886, 893, 71 S Ct 703. And if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction." *Id.*, at page 618. In this regard, "the standard as defined is not a neat, mathematical formulary. Like all verbalizations it is subject to criticism on the score of indefiniteness." *Dennis v United States*, supra, at page 1156. So long as there are ascertainable standards of guilt, that is enough, for impossible standards of specificity are not demanded.

"... The test is whether the language conveys a sufficient definite warning as to the proscribed conduct when measured by common understanding and practice (*United States v Cardiff*, 344 US 174, 73 S Ct 189, 97 L Ed 200; *Cramp v Board of Public Instruction of Orange County, Fla.*, 368 US 278, 82 S Ct 275, 7 L Ed 2d 285, 292; *Winters v New York*, 333 US 507, 68 S Ct 665, 92 L Ed 840; *Champlin Refining Co. v Corporation Commission*, 286 US 210, 52 S Ct 559, 76 L Ed 1062, 86 ALR 403) . . ." [*State v Hill*, 189 Kan 403, 369 P2d 365, 371, 91 ALR2d 750, 760 (1962).]

Be that as it may, the Supreme Court has recently written:

"... The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. Cf. *Marcus v Search Warrant of Property, etc.*, 367 US 717, 733, 6 L ed 2d 1127, 1137, 81 S Ct 1708. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Cf. *Smith v California*, supra (361 US at 151-154); *Speiser v Randall*, 357 US 513, 526, 2 L ed 2d 1460, 1472, 78 S Ct 1332. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. *Cantwell v Connecticut*, 310

US 296, 311, 84 L ed 1213, 1221, 60 S Ct 900, 128 ALR 1352." [N.A.A.C.P. v Button, 371 US 415, 433, 9 L ed 2d 405, 418, 83 S Ct 328 (1963).]

Whatever the test, Article 88 meets the constitutional norm as to certainty. We need not dwell on its susceptibility of improper application for that possibility has had previous assessment. In the matter of "fair notice," we emphasize that Article 88 is designed to cover the use of "contemptuous" words toward holders of certain offices named therein. "Contemptuous" is used in the ordinary sense as is evidenced by the Manual for Courts-Martial, United States, 1951, paragraph 167. See Webster's Third New International Dictionary. The proscribed conduct having been made certain and the warnings sufficient, it follows that the language of the Article satisfies the test of definiteness, just as does Article 133, hereinbefore discussed. See *United States v Fletcher*, *Smith v Whitney*, and *United States v Giordano*, all *supra*. In sum, we answer issues 1, 2, and 3 adversely to the petitioner.

Counsel for the appellant also contend that the law officer erred to the prejudice of Lieutenant Howe in failing to instruct, *sua sponte*, that if the court-martial found the alleged contemptuous words to have been uttered in the course of a political discussion, it thereupon had to find he intended these words to be personally disrespectful.

It is argued that this record shows accused participating in a political discussion, and that, under the circumstances, personal contempt for the President was absent-this latter aspect being an ingredient of the offense.

*444 **180 [5] Assuming the conduct in question amounts to a political discussion, as appellate defense counsel contend, the argument advanced nonetheless fails. A plain and unambiguous statute is to be applied and not interpreted. *United States v Davis*, 12 USCMA 576, 31 CMR 162. Neither the Manual nor the Code make "intent" an element of the offense. Admittedly, paragraph 167 of the Manual, *supra*, provides, in part:

"... Adverse criticism of one of the officials or groups named in the article, in the course of a political discussion, even though emphatically expressed, if not personally contemptuous, may not be charged as a violation of the article." [Emphasis supplied.]

The above-quoted emphasized phrase, however, cannot be equated to the contemptuous language prohibited by this Article. Indeed, paragraph 167 further provides:

"... However, giving broad circulation to a written publication containing contemptuous words of the kind made punishable by this article, or the utterance of such contemptuous words in the presence of military inferiors, would constitute an aggravation of the offense."

Neither the legislative history of the Uniform Code nor interpretation of comparable Articles of War lend themselves to any different interpretation. See *United States v Poli*, CM 235607, 22 BR 151, 161 (1943). Accordingly, the law officer did not err in failing to give a *sua sponte* instruction concerning intent.

The next issue to be considered is whether appellant was substantially prejudiced by the law officer's ruling that the maximum sentence for the charged offenses included confinement at hard labor for three years. The Table of Maximum Punishments, Manual for Courts-Martial, United States, 1951, paragraph 127c, does not provide a stated punishment for either of the offenses here charged. It should be noted that for punishment purposes they were treated as multiplicitous. In those instances where punishment is not stated, if the offense is included within an offense listed

in the Table of Maximum Punishments or is closely related to some other listed offense, "the lesser punishment prescribed for either the included or closely related offense will prevail as the maximum limit of punishment." Paragraph 127c, *supra*. Since neither of the offenses here involved is included within other offenses, it is the contention of the appellate defense counsel that they are most closely akin to the offenses under Article 89 of the Uniform Code, 10 USC § 889, for it makes punishable disrespect toward a superior officer. Six months is the maximum authorized confinement for conviction under this Article. Such was not the view taken by the law officer for he had instructed the court on a three-year maximum for confinement, treating these offenses as being similar to an Article 134 offense of uttering disloyal statements. To this, defense replies that even if the Article 134 offense is possibly related, where an offense not listed in the Table of Maximum Punishments is similar to listed offenses, a preference for the lesser of the two is manifest under paragraph 120c, Manual for Courts-Martial, United States, 1951, and by our holding in *United States v Beach*, 2 USCMA 172, 7 CMR 48.

[6] For the charges and specifications in this case, it is our considered opinion that the offense of disloyal statements, in violation of Article 134 and punishable by a maximum of confinement at hard labor for three years, is most closely analogous to the instant charges. As the Government brief properly points out, the appellant's attack upon the President was made with specific reference to our involvement of overseas hostilities. The gravamen of the offenses charged, as well as that of the Article 134 offense of disloyal statements, are singular, as is the effect of such unlawful actions and declarations upon other members of the armed services (cf. *445 **181 *Sanford v Callan*, 148 F2d 376 (CA5th Cir) (1945)). In this regard, we mention that defense at the trial level moved for dismissal of Charge III alleging that the specification thereunder drawn, as an Article 134 violation of disloyal conduct, failed to state an offense, having been preempted by Article 88, Uniform Code of Military Justice, and other specific Articles "which deal with disloyal conduct."

Accordingly, as to the instant charges and specifications, we find that the law officer gave the court-martial the correct maximum punishment imposable.

Yet another issue is that the law officer erred to the substantial prejudice of the appellant by instructing the court, in spite of the defense objection, that in determining whether the words used by Lieutenant Howe were contemptuous, the court-martial "should apply the test of how the words were understood and what they were taken to mean by the persons who saw them."

The appellant takes the position that the test applicable in this case is the same as that used in criminal prosecutions for obscenity. Related to the case at bar, the proper measurement, counsel contend, should have been "whether to the average person, applying contemporary community standards, on a national basis, the uttered words taken as a whole are contemptuous of the specified public official."

[7] Be that as it may, on this record of trial we envision no prejudice befalling the accused because of the instructions actually given in this area. The issue matters not, when as here, the language utilized by the appellant is obviously contemptuous *per se*. The language utilized on the appellant's placard is hardly susceptible to more than one interpretation. Since World War II, the word "Fascist" has been accorded public definition, just as have such words as "Communist" and "Nazi." Fascism signifies the antithesis of our own system of Government and for the public office holder imputes both malfeasance of office and the more horrendous crime of disloyalty. As stated in *Derounian v Stokes*, 168 F2d 305, 307 (CA10th Cir) (1948):

"... the false charge or characterization of an American citizen of good character and reputation as a pro-Nazi or a pro-Fascist, or as being disloyal to the United States, was reasonably calculated to subject him to public hatred, odium, and contempt, and therefore constituted libel per se. *Grant v Reader's Digest Association*, 2 Cir., 151 F2d 733, certiorari denied 326 US 797, 66 S Ct 492, 90 L ed 485; *Spanel v Pegler*, 7 Cir., 160 F2d 619, 171 ALR 699; *Mencher v Chesley*, 297 NY 94, 75 NE2d 257." [See also *United States v Poli*, supra; cf. *United States v Goins*, 15 USCMA 175, 35 CMR 147; *United States v Wolfson*, CM 413411 (June 24, 1966); 33 Am Jur, Libel and Slander, §§ 53 and 57; 33 ALR2d 1196, 1207.]

In the last error assigned, it is asserted the appellant was prejudiced at the board of review level when Lieutenant Colonel Hagopian refused to disqualify himself from participating as a board of review member in review of the case. This assignment is founded on an affidavit made by military appellate defense counsel. In this document, it is asserted that Lieutenant Colonel Hagopian was at one time a member of the Defense Appellate Division and before it was known that he was going to be appointed to membership on a board of review, appellate defense counsel discussed with the colonel several cases assigned to counsel. Seeking his advice, as an experienced and senior member of the Division, appellate defense counsel had occasion to discuss with the colonel the facts and circumstances surrounding the purported offenses committed by Lieutenant Howe.

During these consultations, the colonel was shown photographs of Howe carrying a placard. His counsel gave the opinion Lieutenant Howe's conduct was not punishable under the Uniform Code of Military *446 **182 Justice. The colonel opined to the contrary, believing such conduct constituted an Article 133 offense. In fact, he could not think of conduct more unbecoming an officer and a gentleman under present-day circumstances.

Appellate defense counsel believe that the colonel ventured his point of view without personal animosity, doing so only in reply to counsel's inquiry as to his opinion on the merits of the case.

Since Lieutenant Colonel Hagopian "did not express a personal prejudice against the appellant, possess a substantial interest in the case, and has not been of counsel or connected with any party or his attorney," the request for disqualification is not considered by defense as an "affidavit of bias or prejudice." Rather, appellant claims the colonel should have stepped aside because there "is an appearance of predisposition for one litigant over the other."

There being no controlling provision in the Uniform Code of Military Justice or in the Manual for Courts-Martial, we have, in prior instances where such allegations are made, turned to civil statutes for guidelines, particularly 28 USC §§ 47, 144, and 455. *United States v Hurt*, 9 USCMA 735, 27 CMR 3. Section 144, supra, is pertinent for it provides for disqualification because of "personal bias or prejudice."

Construing section 144, it has been held that if the affidavit complies with the statutory standards, "the judge has no alternative but to recuse himself, no matter how defamatory the charges may be and even if they are known to the Court to be false." Conversely, "if the statutory requirements are not satisfied, it is the duty of the judge to refuse to disqualify himself. . . . Thus, the mere filing of an affidavit of prejudice does not automatically disqualify a judge, . . . but the judge must pass upon the legal sufficiency of the facts well-pleaded." *United States v Hanrahan*, 248 F Supp 471, 475 (DC DC) (1965).

Thereafter, the test to be applied, accepting the affidavit at face value, is "whether these facts

would fairly convince a sane and reasonable mind that the judge does, in fact, harbor the personal bias or prejudice contemplated by the statute." *Id.*, at page 475. In *Hanrahan*, that court defined prejudice with these words:

"In addition to establishing that a prejudice or bias harbored by a judge is of such a nature that it has, or may have, closed his mind to justice, the factual allegations must also show that this bias is personal, as opposed to judicial, in nature. See, e.g., *Gallarelli v United States*, 260 F2d 259 (1st Cir. 1958), cert. denied, 359 US 938, 79 S Ct 654, 3 L Ed 2d 638 (1959); *United States v Gilboy*, supra 162 F Supp at 394. It is the word 'personal' which is of great significance. See *Craven v United States*, 22 F2d 605, 607 (1st Cir 1927), cert. denied, 276 US 627, 48 S Ct 321, 72 L Ed 739 (1928). It characterizes an attitude towards or opinion about the affiant of extra judicial origin unrelated to his status as a party but pertaining to him as an individual. The distinction to be drawn is 'between a judicial determination derived from evidence and lengthy proceedings had before the court, and a determination not so founded upon facts brought forth in court, but based on attitudes and conceptions that have their origins in sources beyond the four corners of the courtroom.' In re *Federal Facilities Realty Trust Co.*, supra 140 F Supp at 526. A bias or prejudice, if it may be called that, consisting merely in a state of mind based on the evidence adduced in open court is not the personal bias proscribed by the statute. See *United States v Gilbert*, 29 F Supp 507, 508-509 (SD Ohio 1939). 'The statute never contemplated crippling our courts by disqualifying a judge, solely on the basis of a bias (or state of mind, 255 US 42, 41 S Ct 236, 65 L Ed 481) against wrongdoers, civil or criminal, acquired from evidence presented in the course of judicial proceedings before him. Any other *447 **183 construction would make the statute an intolerable obstruction to the efficient conduct of judicial proceedings, now none too speedy or effective.' *Craven v United States*, supra 22 F2d at 608." [*Id.*, at page 476. Cf. *Cole v Loew's Inc.*, 76 F Supp 872 (SD Calif) (1948).]

In the case of *Eisler v United States*, 170 F2d 273 (CA DC Cir) (1948), certiorari granted, 335 US 857, 93 L ed 404, 69 S Ct 130, removed from the Supreme Court docket, 338 US 189, 93 L ed 1897, 69 S Ct 1453, it was contended that bias and prejudice were shown for this purported Communist defendant because of the judge's background as a special assistant to the Attorney General of the United States who, in his former capacity, assisted Federal Bureau of Investigation inquiries into the activities of aliens and Communists, including the appellant. In spite of this past employment and even though the judge had friends "'violently anti-Communist,'" and though he had, in connection with his previous duties, sponsored deportation of alien Communists, the ruling of the court below was upheld regarding the pertinent affidavit in that it did not establish bias and prejudice "in the personal sense contemplated by the statute." *Id.*, at page 278. It was then written:

"... Prejudice, to require recusation, must be personal according to the terms of the statute, and impersonal prejudice resulting from a judge's background or experience is not, in our opinion, within the purview of the statute." [*Ibid.*, at page 278.]

[8] Appellate defense counsel, as we have heretofore pointed out, does not assert Lieutenant Colonel Hagopian was personally biased, only that there was the appearance of a predisposition of bias. It is error for one who is counsel on a case to participate thereafter as a judge, but, measured by the standards set out above, the instant affidavit does not, in our estimation, establish even a predisposition of possible harm. As we have noted, the specification in question is in fact legally sufficient. Lieutenant Colonel Hagopian was called upon to give no more than a legal evaluation of the specification. As a senior member of the Defense Appellate Division, and,

therefore, acting as counsel, he set forth his views. His opinion did not change its legal sufficiency and his subsequent membership on the board of review, therefore, offers no possible prejudice to the appellant.

These are the considerations which prompted denial of the accused's petition in the first instance, and require us to deny the petition for reconsideration.

Chief Judge QUINN and Judge FERGUSON concur.

CMA, 1967.

U.S. v. Howe

1967 WL 4286 (CMA), 37 C.M.R. 429, 17 USCMA 165

'can quote'

"Nothing is non-attributed, everything is on the record. So you can quote me!"

- 12 OCT 07

- 11/18/99

- ~~General~~ ~~class~~ ~~try to choose~~ ~~class~~

- Gen. Zima

- "MEF should be a reservoir of Marine Corps combat capability"

- MEF staff - "too many down HQ"

- "Too many people on P.C.s, not enough people on rifles"

- MEF HQ should be own verifying entity w/ no units

- units report directly to MARFOR's then C/OP to MEF

- I MEF when they had my missions:

Korea, Iraq, Somalia, wildfires, border security, civil unrest.

- HQ in ~~82~~ Somalia began to expand - asked if he could get their product up to the boys there.

- "You can get constipated by your own doctrine" - "Dogma is not doctrine" - ~~Structure~~

- Don't get my up on what doctrine, says - do what works.

- Goldwater - Nichols - passed but not wanted

- Phase I - Conflicting - (stay out of my way)

- Phase II - Coordinate Phase - (now: this works)

- Phase III - ~~Integrating~~ ~~Integrating~~ - Integration Phase

- When working of coalition - must think about inter-cooperation and inter-dependability. - military & cultural.
- political inter-dependability
- Concepts of war fighting - "we are trying to over think war fighting"
- "Then they you don't leave from a book: know to cook, how to fight, & how to well"
- Art of counsel - find that one point of failure - but assumption, wrong person, wrong plan - ~~not~~ ~~make the right of~~ that's when Murphy is going to show up.
- Complex military operation - like chemistry or religion
- once something is introduced, will affect everything else. That's why we decrease any complexity in decrease
- Must now ~~stand~~ only deal with military aspect.
- now have to worry about economy, political, security
- We've got to be MEF's - use to resort to force as much knowledge & industry is that fighting force & out side of it.
- USMC must be ready to do any mission - As the President directs - "we can't say we don't do whatever"
- "Shape the force to meet the requirement"

4. Col. Quengling - "Failed Guardianship" article.
"Petition of Duty" - McMasters, H.R.

- "Don't get ~~enamored~~ ^{enamored} in snappy names"
- Don't change just to change
- "Names + terms just change so the old farts don't know what you're talking about"

- I.O. - Spent six years to promise eg. Iraqi army that if they don't fight, we would take care of them. First thing Bremer does is disband the Iraqi army. - Shows serious disconnect b/t civil in "leadership" + Plans. -

- See Cohen - gave each CIA time with Clinton twice a year. Opportunity to give opinion.

"Once in a while, if the general gets killed, it's good for morale."

- Mission Drift:

- "Got to know when to lay them on the table."

- "Toughest job is saying 'that's enough'."

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APPENDIX F

520 U.S. 681
117 S.Ct. 1636
137 L.Ed.2d 945

William Jefferson CLINTON, Petitioner,
v.
Paula Corbin JONES.

No. 95-1853.

Supreme Court of the United States

Argued Jan. 13, 1997.
Decided May 27, 1997.

Syllabus*

Respondent sued under 42 U.S.C. §§1983 and 1985 and Arkansas law to recover damages from petitioner, the current President of the United States, alleging, inter alia, that while he was Governor of Arkansas, petitioner made "abhorrent" sexual advances to her, and that her rejection of those advances led to punishment by her supervisors in the state job she held at the time. Petitioner promptly advised the Federal District Court that he would file a motion to dismiss on Presidential immunity grounds, and requested that all other pleadings and motions be deferred until the immunity issue was resolved. After the court granted that request, petitioner filed a motion to dismiss without prejudice and to toll any applicable statutes of limitation during his Presidency. The District Judge denied dismissal on immunity grounds and ruled that discovery could go forward, but ordered any trial stayed until petitioner's Presidency ended. The Eighth Circuit affirmed the dismissal denial, but reversed the trial postponement as the "functional equivalent" of a grant of temporary immunity to which petitioner was not constitutionally entitled. The court explained that the President, like other officials, is subject to the same laws that apply to all citizens, that no case had been found in which an official was granted immunity from suit for his unofficial acts, and that the rationale for official immunity is inapposite where only personal, private conduct by a President is at issue. The court also rejected the argument that, unless immunity is available, the threat of judicial interference with the Executive Branch would violate separation of powers.

Held:

1. This Court need not address two important constitutional issues not encompassed within the questions presented by the certiorari petition: (1) whether a claim comparable to petitioner's assertion of immunity might succeed in a state tribunal, and (2) whether a court may compel the President's attendance at any specific time or place.
2. Deferral of this litigation until petitioner's Presidency ends is not constitutionally required.

(a) Petitioner's principal submission-that in all but the most exceptional cases, the Constitution affords the President temporary immunity from civil damages litigation arising out of events that occurred before he took office-cannot be sustained on the basis of precedent. The principal rationale for affording Presidents immunity from damages actions based on their official acts-i.e., to enable them to perform their designated functions effectively without fear that a particular decision may give rise to personal liability, see, e.g., *Nixon v. Fitzgerald*, 457 U.S. 731, 749, 752, and n. 32, 102 S.Ct. 2690, 2701, 2702, and n. 32, 73 L.Ed.2d 349-provides no support for an immunity for unofficial conduct. Moreover, immunities for acts clearly within official capacity are grounded in the nature of the function performed, not the identity of the actor who performed it. *Forrester v. White*, 484 U.S. 219, 229, 108 S.Ct. 538, 545, 98 L.Ed.2d 555. The Court is also unpersuaded by petitioner's historical evidence, which sheds little light on the question at issue, and is largely canceled by conflicting evidence that is itself consistent with both the doctrine of presidential immunity as set forth in *Fitzgerald*, and rejection of the immunity claim in this case.

(b) The separation-of-powers doctrine does not require federal courts to stay all private actions against the President until he leaves office. Even accepting the unique importance of the Presidency in the constitutional scheme, it does not follow that that doctrine would be violated by allowing this action to proceed. The doctrine provides a self-executing safeguard against the encroachment or aggrandizement of one of the three co-equal branches of Government at the expense of another. *Buckley v. Valeo*, 424 U.S. 1, 122, 96 S.Ct. 612, 683-684, 46 L.Ed.2d 659. But in this case there is no suggestion that the Federal Judiciary is being asked to perform any function that might in some way be described as "executive." Respondent is merely asking the courts to exercise their core Article III jurisdiction to decide cases and controversies, and, whatever the outcome, there is no possibility that the decision here will curtail the scope of the Executive Branch's official powers. The Court rejects petitioner's contention that this case-as well as the potential additional litigation that an affirmance of the Eighth Circuit's judgment might spawn-may place unacceptable burdens on the President that will hamper the performance of his official duties. That assertion finds little support either in history, as evidenced by the paucity of suits against sitting Presidents for their private actions, or in the relatively narrow compass of the issues raised in this particular case. Of greater significance, it is settled that the Judiciary may severely burden the Executive Branch by reviewing the legality of the President's official conduct, see e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153, and may direct appropriate process to the President himself, see e.g., *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039. It must follow that the federal courts have power to determine the legality of the President's unofficial conduct. The reasons for rejecting a categorical rule requiring federal courts to stay private actions during the President's term apply as well to a rule that would, in petitioner's words, require a stay "in all but the most exceptional cases."

(c) Contrary to the Eighth Circuit's ruling, the District Court's stay order was not the "functional equivalent" of an unconstitutional grant of temporary immunity. Rather, the District Court has broad discretion to stay proceedings as an incident to its power to control its own docket. See, e.g., *Landis v. North American Co.*, 299 U.S. 248, 254, 57 S.Ct. 163, 165-166, 81 L.Ed. 153. Moreover, the potential burdens on the President posed by this litigation are appropriate matters for that court to evaluate in its management of the case, and the high respect owed the Presidency

is a matter that should inform the conduct of the entire proceeding. Nevertheless, the District Court's stay decision was an abuse of discretion because it took no account of the importance of respondent's interest in bringing the case to trial, and because it was premature in that there was nothing in the record to enable a judge to assess whether postponement of trial after the completion of discovery would be warranted.

(d) The Court is not persuaded of the seriousness of the alleged risks that this decision will generate a large volume of politically motivated harassing and frivolous litigation and that national security concerns might prevent the President from explaining a legitimate need for a continuance, and has confidence in the ability of federal judges to deal with both concerns. If Congress deems it appropriate to afford the President stronger protection, it may respond with legislation.

72 F.3d 1354, affirmed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, THOMAS, and GINSBURG, JJ., joined. BREYER, J., filed an opinion concurring in the judgment.

Robert S. Bennett, for petitioner.

Walter Dellinger, Durham, NC, for the United States, as amicus curiae by special leave of the Court.

Gilbert K. Davis, Fairfax, VA, for respondent.

Justice STEVENS delivered the opinion of the Court.

This case raises a constitutional and a prudential question concerning the Office of the President of the United States. Respondent, a private citizen, seeks to recover damages from the current occupant of that office based on actions allegedly taken before his term began. The President submits that in all but the most exceptional cases the Constitution requires federal courts to defer such litigation until his term ends and that, in any event, respect for the office warrants such a stay. Despite the force of the arguments supporting the President's submissions, we conclude that they must be rejected.

I

Petitioner, William Jefferson Clinton, was elected to the Presidency in 1992, and re-elected in 1996. His term of office expires on January 20, 2001. In 1991 he was the Governor of the State of Arkansas. Respondent, Paula Corbin Jones, is a resident of California. In 1991 she lived in Arkansas, and was an employee of the Arkansas Industrial Development Commission.

On May 6, 1994, she commenced this action in the United States District Court for the Eastern District of Arkansas by filing a complaint naming petitioner and Danny Ferguson, a former Arkansas State Police officer, as defendants. The complaint alleges two federal claims, and two state law claims over which the federal court has jurisdiction because of the diverse

citizenship of the parties.¹ As the case comes to us, we are required to assume the truth of the detailed-but as yet untested- factual allegations in the complaint.

Those allegations principally describe events that are said to have occurred on the afternoon of May 8, 1991, during an official conference held at the Excelsior Hotel in Little Rock, Arkansas. The Governor delivered a speech at the conference; respondent-working as a state employee-staffed the registration desk. She alleges that Ferguson persuaded her to leave her desk and to visit the Governor in a business suite at the hotel, where he made "abhorrent"² sexual advances that she vehemently rejected. She further claims that her superiors at work subsequently dealt with her in a hostile and rude manner, and changed her duties to punish her for rejecting those advances. Finally, she alleges that after petitioner was elected President, Ferguson defamed her by making a statement to a reporter that implied she had accepted petitioner's alleged overtures, and that various persons authorized to speak for the President publicly branded her a liar by denying that the incident had occurred.

Respondent seeks actual damages of \$75,000, and punitive damages of \$100,000. Her complaint contains four counts. The first charges that petitioner, acting under color of state law, deprived her of rights protected by the Constitution, in violation of Rev. Stat. §1979, 42 U.S.C. §1983. The second charges that petitioner and Ferguson engaged in a conspiracy to violate her federal rights, also actionable under federal law. See Rev. Stat. §1980, 42 U.S.C. §1985. The third is a state common law claim for intentional infliction of emotional distress, grounded primarily on the incident at the hotel. The fourth count, also based on state law, is for defamation, embracing both the comments allegedly made to the press by Ferguson and the statements of petitioner's agents. Inasmuch as the legal sufficiency of the claims has not yet been challenged, we assume, without deciding, that each of the four counts states a cause of action as a matter of law. With the exception of the last charge, which arguably may involve conduct within the outer perimeter of the President's official responsibilities, it is perfectly clear that the alleged misconduct of petitioner was unrelated to any of his official duties as President of the United States and, indeed, occurred before he was elected to that office.³

II

In response to the complaint, petitioner promptly advised the District Court that he intended to file a motion to dismiss on grounds of Presidential immunity, and requested the court to defer all other pleadings and motions until after the immunity issue was resolved.⁴ Relying on our cases holding that immunity questions should be decided at the earliest possible stage of the litigation, 858 F.Supp. 902, 905 (E.D.Ark.1994), our recognition of the "'singular importance of the President's duties,'" *id.*, at 904 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 751, 102 S.Ct. 2690, 2702, 73 L.Ed.2d 349 (1982)), and the fact that the question did not require any analysis of the allegations of the complaint, 858 F.Supp., at 905, the court granted the request. Petitioner thereupon filed a motion "to dismiss . . . without prejudice and to toll any statutes of limitation [that may be applicable] until he is no longer President, at which time the plaintiff may refile the instant suit." Record, Doc. No. 17. Extensive submissions were made to the District Court by the parties and the Department of Justice.⁵

The District Judge denied the motion to dismiss on immunity grounds and ruled that discovery in the case could go forward, but ordered any trial stayed until the end of petitioner's Presidency. 869 F.Supp. 690 (E.D.Ark.1994). Although she recognized that a "thin majority" in *Nixon v. Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982), had held that "the

President has absolute immunity from civil damage actions arising out of the execution of official duties of office," she was not convinced that "a President has absolute immunity from civil causes of action arising prior to assuming the office."⁶ She was, however, persuaded by some of the reasoning in our opinion in *Fitzgerald* that deferring the trial if one were required would be appropriate.⁷ 869 F.Supp., at 699-700. Relying in part on the fact that respondent had failed to bring her complaint until two days before the 3-year period of limitations expired, she concluded that the public interest in avoiding litigation that might hamper the President in conducting the duties of his office outweighed any demonstrated need for an immediate trial. *Id.*, at 698-699.

Both parties appealed. A divided panel of the Court of Appeals affirmed the denial of the motion to dismiss, but because it regarded the order postponing the trial until the President leaves office as the "functional equivalent" of a grant of temporary immunity, it reversed that order. 72 F.3d 1354, 1361, n. 9, 1363 (C.A.8 1996). Writing for the majority, Judge Bowman explained that "the President, like all other government officials, is subject to the same laws that apply to all other members of our society," *id.*, at 1358, that he could find no "case in which any public official ever has been granted any immunity from suit for his unofficial acts," *ibid.*, and that the rationale for official immunity "is inapposite where only personal, private conduct by a President is at issue," *id.*, at 1360. The majority specifically rejected the argument that, unless immunity is available, the threat of judicial interference with the Executive Branch through scheduling orders, potential contempt citations, and sanctions would violate separation of powers principles. Judge Bowman suggested that "judicial case management sensitive to the burdens of the presidency and the demands of the President's schedule," would avoid the perceived danger. *Id.*, at 1361.

In dissent, Judge Ross submitted that even though the holding in *Fitzgerald* involved official acts, the logic of the opinion, which "placed primary reliance on the prospect that the President's discharge of his constitutional powers and duties would be impaired if he were subject to suits for damages," applies with equal force to this case. 72 F.3d, at 1367. In his view, "unless exigent circumstances can be shown," all private actions for damages against a sitting President must be stayed until the completion of his term. *Ibid.* In this case, Judge Ross saw no reason why the stay would prevent respondent from ultimately obtaining an adjudication of her claims.

In response to the dissent, Judge Beam wrote a separate concurrence. He suggested that a prolonged delay may well create a significant risk of irreparable harm to respondent because of an unforeseeable loss of evidence or the possible death of a party. *Id.*, at 1363-1364. Moreover, he argued that in civil rights cases brought under §1983 there is a "public interest in an ordinary citizen's timely vindication of . . . her most fundamental rights against alleged abuse of power by government officials." *Id.*, at 1365. In his view, the dissent's concern about judicial interference with the functioning of the Presidency was "greatly overstated." *Ibid.* Neither the involvement of prior presidents in litigation, either as parties or as witnesses, nor the character of this "relatively uncomplicated civil litigation," indicated that the threat was serious. *Id.*, at 1365-1366. Finally, he saw "no basis for staying discovery or trial of the claims against Trooper Ferguson." *Id.*, at 1366.⁸

III

The President, represented by private counsel, filed a petition for certiorari. The Solicitor General, representing the United States, supported the petition, arguing that the decision of the Court of Appeals was "fundamentally mistaken" and created "serious risks for the institution of the Presidency."⁹ In her brief in opposition to certiorari, respondent argued that this "one-of-a-kind case is singularly inappropriate" for the exercise of our certiorari jurisdiction because it did not create any conflict among the Courts of Appeals, it "does not pose any conceivable threat to the functioning of the Executive Branch," and there is no precedent supporting the President's position.¹⁰

While our decision to grant the petition expressed no judgment concerning the merits of the case, it does reflect our appraisal of its importance. The representations made on behalf of the Executive Branch as to the potential impact of the precedent established by the Court of Appeals merit our respectful and deliberate consideration.

It is true that we have often stressed the importance of avoiding the premature adjudication of constitutional questions.¹¹ That doctrine of avoidance, however, is applicable to the entire Federal Judiciary, not just to this Court, cf. *Arizonans for Official English v. Arizona*, 520 U.S. ---, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997), and comes into play after the court has acquired jurisdiction of a case. It does not dictate a discretionary denial of every certiorari petition raising a novel constitutional question. It does, however, make it appropriate to identify two important constitutional issues not encompassed within the questions presented by the petition for certiorari that we need not address today.¹²

First, because the claim of immunity is asserted in a federal court and relies heavily on the doctrine of separation of powers that restrains each of the three branches of the Federal Government from encroaching on the domain of the other two, see, e.g., *Buckley v. Valeo*, 424 U.S. 1, 122, 96 S.Ct. 612, 683-684, 46 L.Ed.2d 659 (1976), it is not necessary to consider or decide whether a comparable claim might succeed in a state tribunal. If this case were being heard in a state forum, instead of advancing a separation of powers argument, petitioner would presumably rely on federalism and comity concerns,¹³ as well as the interest in protecting federal officials from possible local prejudice that underlies the authority to remove certain cases brought against federal officers from a state to a federal court, see 28 U.S.C. §1442(a); *Mesa v. California*, 489 U.S. 121, 125-126, 109 S.Ct. 959, 962-963, 103 L.Ed.2d 99 (1989). Whether those concerns would present a more compelling case for immunity is a question that is not before us.

Second, our decision rejecting the immunity claim and allowing the case to proceed does not require us to confront the question whether a court may compel the attendance of the President at any specific time or place. We assume that the testimony of the President, both for discovery and for use at trial, may be taken at the White House at a time that will accommodate his busy schedule, and that, if a trial is held, there would be no necessity for the President to attend in person, though he could elect to do so.¹⁴

IV

Petitioner's principal submission-that "in all but the most exceptional cases," Brief for Petitioner i, the Constitution affords the President temporary immunity from civil damages

litigation arising out of events that occurred before he took office-cannot be sustained on the basis of precedent.

Only three sitting Presidents have been defendants in civil litigation involving their actions prior to taking office. Complaints against Theodore Roosevelt and Harry Truman had been dismissed before they took office; the dismissals were affirmed after their respective inaugurations.¹⁵ Two companion cases arising out of an automobile accident were filed against John F. Kennedy in 1960 during the Presidential campaign.¹⁶ After taking office, he unsuccessfully argued that his status as Commander in Chief gave him a right to a stay under the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.App. §§501-525. The motion for a stay was denied by the District Court, and the matter was settled out of court.¹⁷ Thus, none of those cases sheds any light on the constitutional issue before us.

The principal rationale for affording certain public servants immunity from suits for money damages arising out of their official acts is inapplicable to unofficial conduct. In cases involving prosecutors, legislators, and judges we have repeatedly explained that the immunity serves the public interest in enabling such officials to perform their designated functions effectively without fear that a particular decision may give rise to personal liability.¹⁸ We explained in *Ferri v. Ackerman*, 444 U.S. 193, 100 S.Ct. 402, 62 L.Ed.2d 355 (1979):

"As public servants, the prosecutor and the judge represent the interest of society as a whole. The conduct of their official duties may adversely affect a wide variety of different individuals, each of whom may be a potential source of future controversy. The societal interest in providing such public officials with the maximum ability to deal fearlessly and impartially with the public at large has long been recognized as an acceptable justification for official immunity. The point of immunity for such officials is to forestall an atmosphere of intimidation that would conflict with their resolve to perform their designated functions in a principled fashion." *Id.*, at 202-204, 100 S.Ct., at 408-409.

That rationale provided the principal basis for our holding that a former President of the United States was "entitled to absolute immunity from damages liability predicated on his official acts," *Fitzgerald*, 457 U.S., at 749, 102 S.Ct., at 2701. See *id.*, at 752, 102 S.Ct., at 2702 (citing *Ferri v. Ackerman*). Our central concern was to avoid rendering the President "unduly cautious in the discharge of his official duties." 457 U.S., at 752, n. 32, 102 S.Ct., at 2702, n. 32.¹⁹

This reasoning provides no support for an immunity for unofficial conduct. As we explained in *Fitzgerald*, "the sphere of protected action must be related closely to the immunity's justifying purposes." *Id.*, at 755, 102 S.Ct., at 2704. Because of the President's broad responsibilities, we recognized in that case an immunity from damages claims arising out of official acts extending to the "outer perimeter of his authority." *Id.*, at 757, 102 S.Ct., at 2705. But we have never suggested that the President, or any other official, has an immunity that extends beyond the scope of any action taken in an official capacity. See *id.*, at 759, 102 S.Ct., at 2706 (Burger, C. J., concurring) (noting that "a President, like Members of Congress, judges, prosecutors, or congressional aides-all having absolute immunity- are not immune for acts outside official duties"); see also *id.*, at 761, n. 4, 102 S.Ct., at 2707, n. 4.

Moreover, when defining the scope of an immunity for acts clearly taken within an official capacity, we have applied a functional approach. "Frequently our decisions have held that an official's absolute immunity should extend only to acts in performance of particular functions of his office." *Id.*, at 755, 102 S.Ct., at 2704. Hence, for example, a judge's absolute immunity does not extend to actions performed in a purely administrative capacity. See *Forrester v. White*, 484

U.S. 219, 229-230, 108 S.Ct. 538, 545-546, 98 L.Ed.2d 555 (1988). As our opinions have made clear, immunities are grounded in "the nature of the function performed, not the identity of the actor who performed it." *Id.*, at 229, 108 S.Ct., at 545.

Petitioner's effort to construct an immunity from suit for unofficial acts grounded purely in the identity of his office is unsupported by precedent.

V

We are also unpersuaded by the evidence from the historical record to which petitioner has called our attention. He points to a comment by Thomas Jefferson protesting the subpoena duces tecum Chief Justice Marshall directed to him in the Burr trial,²⁰ a statement in the diaries kept by Senator William Maclay of the first Senate debates, in which then Vice-President John Adams and Senator Oliver Ellsworth are recorded as having said that "the President personally [is] not . . . subject to any process whatever," lest it be "put . . . in the power of a common Justice to exercise any Authority over him and Stop the Whole Machine of Government,"²¹ and to a quotation from Justice Story's *Commentaries on the Constitution*.²² None of these sources sheds much light on the question at hand.²³

Respondent, in turn, has called our attention to conflicting historical evidence. Speaking in favor of the Constitution's adoption at the Pennsylvania Convention, James Wilson—who had participated in the Philadelphia Convention at which the document was drafted—explained that, although the President "is placed [on] high," "not a single privilege is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by impeachment." 2 J. Elliot, *Debates on the Federal Constitution* 480 (2d ed. 1863) (emphasis omitted). This description is consistent with both the doctrine of presidential immunity as set forth in *Fitzgerald*, and rejection of the immunity claim in this case. With respect to acts taken in his "public character"—that is official acts—the President may be disciplined principally by impeachment, not by private lawsuits for damages. But he is otherwise subject to the laws for his purely private acts.

In the end, as applied to the particular question before us, we reach the same conclusion about these historical materials that Justice Jackson described when confronted with an issue concerning the dimensions of the President's power. "Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharoah. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side They largely cancel each other." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-635, 72 S.Ct. 863, 869-870, 96 L.Ed. 1153 (1952) (concurring opinion).

VI

Petitioner's strongest argument supporting his immunity claim is based on the text and structure of the Constitution. He does not contend that the occupant of the Office of the President is "above the law," in the sense that his conduct is entirely immune from judicial scrutiny.²⁴ The President argues merely for a postponement of the judicial proceedings that will determine whether he violated any law. His argument is grounded in the character of the office that was

created by Article II of the Constitution, and relies on separation of powers principles that have structured our constitutional arrangement since the founding.

As a starting premise, petitioner contends that he occupies a unique office with powers and responsibilities so vast and important that the public interest demands that he devote his undivided time and attention to his public duties. He submits that-given the nature of the office-the doctrine of separation of powers places limits on the authority of the Federal Judiciary to interfere with the Executive Branch that would be transgressed by allowing this action to proceed.

We have no dispute with the initial premise of the argument. Former presidents, from George Washington to George Bush, have consistently endorsed petitioner's characterization of the office.²⁵ After serving his term, Lyndon Johnson observed: "Of all the 1,886 nights I was President, there were not many when I got to sleep before 1 or 2 a. m., and there were few mornings when I didn't wake up by 6 or 6:30."²⁶ In 1967, the Twenty-fifth Amendment to the Constitution was adopted to ensure continuity in the performance of the powers and duties of the office;²⁷ one of the sponsors of that Amendment stressed the importance of providing that "at all times" there be a President "who has complete control and will be able to perform" those duties.²⁸ As Justice Jackson has pointed out, the Presidency concentrates executive authority "in a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations. In drama, magnitude and finality his decisions so far overshadow any others that almost alone he fills the public eye and ear." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S., at 653, 72 S.Ct., at 879 (Jackson, J., concurring). We have, in short, long recognized the "unique position in the constitutional scheme" that this office occupies. *Fitzgerald*, 457 U.S., at 749, 102 S.Ct., at 2701.²⁹ Thus, while we suspect that even in our modern era there remains some truth to Chief Justice Marshall's suggestion that the duties of the Presidency are not entirely "unremitting," *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.Va.1807), we accept the initial premise of the Executive's argument.

It does not follow, however, that separation of powers principles would be violated by allowing this action to proceed. The doctrine of separation of powers is concerned with the allocation of official power among the three co-equal branches of our Government. The Framers "built into the tripartite Federal Government . . . a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S., at 122, 96 S.Ct., at 684.³⁰ Thus, for example, the Congress may not exercise the judicial power to revise final judgments, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995),³¹ or the executive power to manage an airport, see *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276, 111 S.Ct. 2298, 2312, 115 L.Ed.2d 236 (1991) (holding that "[i]f the power is executive, the Constitution does not permit an agent of Congress to exercise it").³² See *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406, 48 S.Ct. 348, 351, 72 L.Ed. 624 (1928) (Congress may not "invest itself or its members with either executive power or judicial power"). Similarly, the President may not exercise the legislative power to authorize the seizure of private property for public use. *Youngstown*, 343 U.S., at 588, 72 S.Ct., at 867. And, the judicial power to decide cases and controversies does not include the provision of purely advisory opinions to the Executive,³³ or permit the federal courts to resolve non justiciable questions.³⁴

Of course the lines between the powers of the three branches are not always neatly defined. See *Mistretta v. United States*, 488 U.S. 361, 380-381, 109 S.Ct. 647, 659-660, 102 L.Ed.2d 714 (1989).³⁵ But in this case there is no suggestion that the Federal Judiciary is being

asked to perform any function that might in some way be described as "executive." Respondent is merely asking the courts to exercise their core Article III jurisdiction to decide cases and controversies. Whatever the outcome of this case, there is no possibility that the decision will curtail the scope of the official powers of the Executive Branch. The litigation of questions that relate entirely to the unofficial conduct of the individual who happens to be the President poses no perceptible risk of misallocation of either judicial power or executive power.

Rather than arguing that the decision of the case will produce either an aggrandizement of judicial power or a narrowing of executive power, petitioner contends that-as a by-product of an otherwise traditional exercise of judicial power-burdens will be placed on the President that will hamper the performance of his official duties. We have recognized that "[e]ven when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties." *Loving v. United States*, 517 U.S. ----, ----, 116 S.Ct. 1737, 1743, 135 L.Ed.2d 36 (1996); see also *Nixon v. Administrator of General Services*, 433 U.S. 425, 443, 97 S.Ct. 2777, 2790, 53 L.Ed.2d 867 (1977). As a factual matter, petitioner contends that this particular case-as well as the potential additional litigation that an affirmance of the Court of Appeals judgment might spawn-may impose an unacceptable burden on the President's time and energy, and thereby impair the effective performance of his office.

Petitioner's predictive judgment finds little support in either history or the relatively narrow compass of the issues raised in this particular case. As we have already noted, in the more than 200-year history of the Republic, only three sitting Presidents have been subjected to suits for their private actions.³⁶ See *supra*, at _____. If the past is any indicator, it seems unlikely that a deluge of such litigation will ever engulf the Presidency. As for the case at hand, if properly managed by the District Court, it appears to us highly unlikely to occupy any substantial amount of petitioner's time.

Of greater significance, petitioner errs by presuming that interactions between the Judicial Branch and the Executive, even quite burdensome interactions, necessarily rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions. "[O]ur . . . system imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence the absence of which "would preclude the establishment of a Nation capable of governing itself effectively." *Mistretta*, 488 U.S., at 381, 109 S.Ct., at 659 (quoting *Buckley*, 424 U.S., at 121, 96 S.Ct., at 683). As Madison explained, separation of powers does not mean that the branches "ought to have no partial agency in, or no controul over the acts of each other."³⁷ The fact that a federal court's exercise of its traditional Article III jurisdiction may significantly burden the time and attention of the Chief Executive is not sufficient to establish a violation of the Constitution. Two long-settled propositions, first announced by Chief Justice Marshall, support that conclusion.

First, we have long held that when the President takes official action, the Court has the authority to determine whether he has acted within the law. Perhaps the most dramatic example of such a case is our holding that President Truman exceeded his constitutional authority when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills in order to avert a national catastrophe. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952). Despite the serious impact of that decision on the ability of the Executive Branch to accomplish its assigned mission, and the substantial time that the President must necessarily have devoted to the matter as a result of judicial involvement, we exercised our Article III jurisdiction to decide whether his official

conduct conformed to the law. Our holding was an application of the principle established in *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803), that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Id.*, at 177.

Second, it is also settled that the President is subject to judicial process in appropriate circumstances. Although Thomas Jefferson apparently thought otherwise, Chief Justice Marshall, when presiding in the treason trial of Aaron Burr, ruled that a subpoena duces tecum could be directed to the President. *United States v. Burr*, 25 F. Cas. 30 (No. 14,692d) (C.C.Va. 1807).³⁸ We unequivocally and emphatically endorsed Marshall's position when we held that President Nixon was obligated to comply with a subpoena commanding him to produce certain tape recordings of his conversations with his aides. *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). As we explained, "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances." *Id.*, at 706, 94 S.Ct., at 3106.³⁹

Sitting Presidents have responded to court orders to provide testimony and other information with sufficient frequency that such interactions between the Judicial and Executive Branches can scarcely be thought a novelty. President Monroe responded to written interrogatories, see Rotunda, *Presidents and Ex-Presidents as Witnesses: A Brief Historical Footnote*, 1975 U. Ill. L.F. 1, 5-6, President Nixon—as noted above—produced tapes in response to a subpoena duces tecum, see *United States v. Nixon*, President Ford complied with an order to give a deposition in a criminal trial, *United States v. Fromme*, 405 F.Supp. 578 (E.D.Cal.1975), and President Clinton has twice given videotaped testimony in criminal proceedings, see *United States v. McDougal*, 934 F.Supp. 296 (E.D.Ark.1996); *United States v. Branscum*, No., LRP-CR-96-49 (E.D. Ark., June 7, 1996). Moreover, sitting Presidents have also voluntarily complied with judicial requests for testimony. President Grant gave a lengthy deposition in a criminal case under such circumstances, R. Rotunda & J. Nowak, *Treatise on Constitutional Law* §7.1 (2d ed.1992), and President Carter similarly gave videotaped testimony for use at a criminal trial, *ibid.*

In sum, "[i]t is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States." *Fitzgerald*, 457 U.S., at 753-754, 102 S.Ct., at 2703. If the Judiciary may severely burden the Executive Branch by reviewing the legality of the President's official conduct, and if it may direct appropriate process to the President himself, it must follow that the federal courts have power to determine the legality of his unofficial conduct. The burden on the President's time and energy that is a mere by-product of such review surely cannot be considered as onerous as the direct burden imposed by judicial review and the occasional invalidation of his official actions.⁴⁰ We therefore hold that the doctrine of separation of powers does not require federal courts to stay all private actions against the President until he leaves office.

The reasons for rejecting such a categorical rule apply as well to a rule that would require a stay "in all but the most exceptional cases." Brief for Petitioner i. Indeed, if the Framers of the Constitution had thought it necessary to protect the President from the burdens of private litigation, we think it far more likely that they would have adopted a categorical rule than a rule that required the President to litigate the question whether a specific case belonged in the "exceptional case" subcategory. In all events, the question whether a specific case should receive exceptional treatment is more appropriately the subject of the exercise of judicial discretion than

an interpretation of the Constitution. Accordingly, we turn to the question whether the District Court's decision to stay the trial until after petitioner leaves office was an abuse of discretion.

VII

The Court of Appeals described the District Court's discretionary decision to stay the trial as the "functional equivalent" of a grant of temporary immunity. 72 F.3d, at 1361, n. 9. Concluding that petitioner was not constitutionally entitled to such an immunity, the court held that it was error to grant the stay. *Ibid.* Although we ultimately conclude that the stay should not have been granted, we think the issue is more difficult than the opinion of the Court of Appeals suggests.

Strictly speaking the stay was not the functional equivalent of the constitutional immunity that petitioner claimed, because the District Court ordered discovery to proceed. Moreover, a stay of either the trial or discovery might be justified by considerations that do not require the recognition of any constitutional immunity. The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket. See, e.g., *Landis v. North American Co.*, 299 U.S. 248, 254, 57 S.Ct. 163, 165-166, 81 L.Ed. 153 (1936). As we have explained, "[e]specially in cases of extraordinary public moment, [a plaintiff] may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted." *Id.*, at 256, 57 S.Ct., at 166. Although we have rejected the argument that the potential burdens on the President violate separation of powers principles, those burdens are appropriate matters for the District Court to evaluate in its management of the case. The high respect that is owed to the office of the Chief Executive, though not justifying a rule of categorical immunity, is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery.⁴¹

Nevertheless, we are persuaded that it was an abuse of discretion for the District Court to defer the trial until after the President leaves office. Such a lengthy and categorical stay takes no account whatever of the respondent's interest in bringing the case to trial. The complaint was filed within the statutory limitations period-albeit near the end of that period-and delaying trial would increase the danger of prejudice resulting from the loss of evidence, including the inability of witnesses to recall specific facts, or the possible death of a party.

The decision to postpone the trial was, furthermore, premature. The proponent of a stay bears the burden of establishing its need. *Id.*, at 255, 57 S.Ct., at 166. In this case, at the stage at which the District Court made its ruling, there was no way to assess whether a stay of trial after the completion of discovery would be warranted. Other than the fact that a trial may consume some of the President's time and attention, there is nothing in the record to enable a judge to assess the potential harm that may ensue from scheduling the trial promptly after discovery is concluded. We think the District Court may have given undue weight to the concern that a trial might generate unrelated civil actions that could conceivably hamper the President in conducting the duties of his office. If and when that should occur, the court's discretion would permit it to manage those actions in such fashion (including deferral of trial) that interference with the President's duties would not occur. But no such impingement upon the President's conduct of his office was shown here.

VIII

We add a final comment on two matters that are discussed at length in the briefs: the risk that our decision will generate a large volume of politically motivated harassing and frivolous litigation, and the danger that national security concerns might prevent the President from explaining a legitimate need for a continuance.

We are not persuaded that either of these risks is serious. Most frivolous and vexatious litigation is terminated at the pleading stage or on summary judgment, with little if any personal involvement by the defendant. See Fed. Rules Civ. Proc. 12, 56. Moreover, the availability of sanctions provides a significant deterrent to litigation directed at the President in his unofficial capacity for purposes of political gain or harassment.⁴² History indicates that the likelihood that a significant number of such cases will be filed is remote. Although scheduling problems may arise, there is no reason to assume that the District Courts will be either unable to accommodate the President's needs or unfaithful to the tradition—especially in matters involving national security—of giving "the utmost deference to Presidential responsibilities."⁴³ Several Presidents, including petitioner, have given testimony without jeopardizing the Nation's security. See *supra*, at _____. In short, we have confidence in the ability of our federal judges to deal with both of these concerns.

If Congress deems it appropriate to afford the President stronger protection, it may respond with appropriate legislation. As petitioner notes in his brief, Congress has enacted more than one statute providing for the deferral of civil litigation to accommodate important public interests. Brief for Petitioner 34-36. See, e.g., 11 U.S.C. §362 (litigation against debtor stayed upon filing of bankruptcy petition); Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.App. §§501-525 (provisions governing, *inter alia*, tolling or stay of civil claims by or against military personnel during course of active duty). If the Constitution embodied the rule that the President advocates, Congress, of course, could not repeal it. But our holding today raises no barrier to a statutory response to these concerns.

The Federal District Court has jurisdiction to decide this case. Like every other citizen who properly invokes that jurisdiction, respondent has a right to an orderly disposition of her claims. Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

Justice BREYER, concurring in the judgment.

I agree with the majority that the Constitution does not automatically grant the President an immunity from civil lawsuits based upon his private conduct. Nor does the "doctrine of separation of powers . . . require federal courts to stay" virtually "all private actions against the President until he leaves office." *Ante*, at _____. Rather, as the Court of Appeals stated, the President cannot simply rest upon the claim that a private civil lawsuit for damages will "interfere with the constitutionally assigned duties of the Executive Branch . . . without detailing any specific responsibilities or explaining how or the degree to which they are affected by the suit." 72 F.3d 1354, 1361 (C.A.8 1996). To obtain a postponement the President must "bear the burden of establishing its need." *Ante*, at _____.

In my view, however, once the President sets forth and explains a conflict between judicial proceeding and public duties, the matter changes. At that point, the Constitution permits a judge

to schedule a trial in an ordinary civil damages action (where postponement normally is possible without overwhelming damage to a plaintiff) only within the constraints of a constitutional principle—a principle that forbids a federal judge in such a case to interfere with the President's discharge of his public duties. I have no doubt that the Constitution contains such a principle applicable to civil suits, based upon Article II's vesting of the entire "executive Power" in a single individual, implemented through the Constitution's structural separation of powers, and revealed both by history and case precedent.

I recognize that this case does not require us now to apply the principle specifically, thereby delineating its contours; nor need we now decide whether lower courts are to apply it directly or categorically through the use of presumptions or rules of administration. Yet I fear that to disregard it now may appear to deny it. I also fear that the majority's description of the relevant precedents de-emphasizes the extent to which they support a principle of the President's independent authority to control his own time and energy, see, e.g., ante, at ___ (describing the "central concern" of *Nixon v. Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982), as "to avoid rendering the President "unduly cautious""); ante, at ___, and n. 23 (describing statements by Story, Jefferson, Adams, and Ellsworth as providing "little" or "no substantial support" for the President's position). Further, if the majority is wrong in predicting the future infrequency of private civil litigation against sitting Presidents, ante, at ___, acknowledgement and future delineation of the constitutional principle will prove a practically necessary institutional safeguard. For these reasons, I think it important to explain how the Constitution's text, history, and precedent support this principle of judicial noninterference with Presidential functions in ordinary civil damages actions.

I

The Constitution states that the "executive Power shall be vested in a President." U.S. Const., Art. II, §1. This constitutional delegation means that a sitting President is unusually busy, that his activities have an unusually important impact upon the lives of others, and that his conduct embodies an authority bestowed by the entire American electorate. He (along with his constitutionally subordinate Vice President) is the only official for whom the entire Nation votes, and is the only elected officer to represent the entire Nation both domestically and abroad.

This constitutional delegation means still more. Article II makes a single President responsible for the actions of the Executive Branch in much the same way that the entire Congress is responsible for the actions of the Legislative Branch, or the entire Judiciary for those of the Judicial Branch. It thereby creates a constitutional equivalence between a single President, on the one hand, and many legislators, or judges, on the other.

The Founders created this equivalence by consciously deciding to vest Executive authority in one person rather than several. They did so in order to focus, rather than to spread, Executive responsibility thereby facilitating accountability. They also sought to encourage energetic, vigorous, decisive, and speedy execution of the laws by placing in the hands of a single, constitutionally indispensable, individual the ultimate authority that, in respect to the other branches, the Constitution divides among many. Compare U.S. Const., Art. II, §1 (vesting power in "a President") with U.S. Const., Art. I, §1 (vesting power in "a Congress" that "consist[s] of a Senate and House of Representatives") and U.S. Const., Art. III, §1 (vesting power in a "supreme Court" and "inferior Courts").

The authority explaining the nature and importance of this decision is legion. See, e.g., J. Locke, *Second Treatise of Civil Government* §144 (J. Gough ed. 1947) (desirability of a perpetual Executive); W. Blackstone, *Commentaries* *242-243 (need for single Executive); *The Federalist* No. 70, p. 423 (C. Rossiter ed. 1961) (A. Hamilton) (Executive " [e]nergy" needed for security, "steady administration of the laws," "protection of property," "justice," and protection of "liberty"); Oliver Ellsworth, *The Landholder*, VI, in *Essays on the Constitution* 163 (P. Ford ed. 1892) ("supreme executive should be one person, and unfettered otherwise than by the laws he is to execute"); *Morrison v. Olson*, 487 U.S. 654, 698-699, 108 S.Ct. 2597, 2623, 101 L.Ed.2d 569 (1988) (SCALIA, J., dissenting) (describing history); *id.*, at 705, 108 S.Ct., at 2626-2627 (describing textual basis); *id.*, at 729, 108 S.Ct., at 2638-2639 (describing policy arguments). See also *The Federalist* No. 71, at 431 (A. Hamilton); P. Kurland, *Watergate and the Constitution* 135 (1978) (President is "sole indispensable man in government" and "should not be called" from his duties "at the instance of any other . . . branch of government"); Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 Ark. L.Rev. 23, 37-47 (1995). Cf. T. Roosevelt, *An Autobiography* 372 (1913).

For present purposes, this constitutional structure means that the President is not like Congress, for Congress can function as if it were whole, even when up to half of its members are absent, see U.S. Const., Art. I, §5, cl. 1. It means that the President is not like the Judiciary, for judges often can designate other judges, e.g., from other judicial circuits, to sit even should an entire court be detained by personal litigation. It means that, unlike Congress, which is regularly out of session, U.S. Const., Art. I, §§4, 5, 7, the President never adjourns.

More importantly, these constitutional objectives explain why a President, though able to delegate duties to others, cannot delegate ultimate responsibility or the active obligation to supervise that goes with it. And the related constitutional equivalence between President, Congress, and the Judiciary, means that judicial scheduling orders in a private civil case must not only take reasonable account of, say, a particularly busy schedule, or a job on which others critically depend, or an underlying electoral mandate. They must also reflect the fact that interference with a President's ability to carry out his public responsibilities is constitutionally equivalent to interference with the ability of the entirety of Congress, or the Judicial Branch, to carry out their public obligations.

II

The leading case regarding Presidential immunity from suit is *Nixon v. Fitzgerald*. Before discussing *Fitzgerald*, it is helpful to understand the historical precedent on which it relies. While later events have called into question some of the more extreme views on Presidential immunity, the essence of the Constitutional principle remains true today. The historical sources, while not in themselves fully determinative, in conjunction with this Court's precedent inform my judgment that the Constitution protects the President from judicial orders in private civil cases to the extent that those orders could significantly interfere with his efforts to carry out his ongoing public responsibilities.

A

Three of the historical sources this Court cited in *Fitzgerald*, 457 U.S., at 749, 750-752, n. 31, 102 S.Ct., at 2701, 2701-2703, n. 32-a commentary by Joseph Story, an argument attributed

to John Adams and Oliver Ellsworth, and a letter written by Thomas Jefferson--each make clear that this is so.

First, Joseph Story wrote in his Commentaries:

"There are . . . incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among those, must necessarily be included the power to perform them, without any obstruction or impediment whatsoever. The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability." 3 J. Story, Commentaries on the Constitution of the United States §1563, pp. 418-419 (1833) (emphasis added), quoted in Fitzgerald, *supra*, at 749, 102 S.Ct., at 2701.

As interpreted by this Court in *Nixon v. Fitzgerald*, the words "for this purpose" would seem to refer to the President's need for "official inviolability" in order to "perform" the duties of his office without "obstruction or impediment." As so read, Story's commentary does not explicitly define the contours of "official inviolability." But it does suggest that the "inviolability" is time bound ("while . . . in the discharge of the duties of his office"); that it applies in private lawsuits (for it attaches to the President's "person" in "civil cases"); and that it is functional ("necessarily implied from the nature of the [President's] functions").

Since *Nixon* did not involve a physical constraint, the Court's reliance upon Justice Story's commentary makes clear, in the Court's view, that the commentary does not limit the scope of "inviolability" to an immunity from a physical imprisonment, physical detention, or physical "arrest"--a now abandoned procedure that permitted the arrest of certain civil case defendants (e.g., those threatened by bankruptcy) during a civil proceeding.

I would therefore read Story's commentary to mean what it says, namely that Article II implicitly grants an "official inviolability" to the President "while he is in the discharge of the duties of his office," and that this inviolability must be broad enough to permit him "to perform" his official duties without "obstruction or impediment." As this Court has previously held, the Constitution may grant this kind of protection implicitly; it need not do so explicitly. See Fitzgerald, *supra*, at 750, n. 31, 102 S.Ct., at 2701, n. 31; *United States v. Nixon*, 418 U.S. 683, 705-706, n. 16, 94 S.Ct. 3090, 3106, n. 16, 41 L.Ed.2d 1039 (1974); cf. *McCulloch v. Maryland*, 4 Wheat. 316, 406, 4 L.Ed. 579 (1819).

Second, during the first Congress, then-Vice President John Adams and then-Senator Oliver Ellsworth expressed a view of an applicable immunity far broader than any currently asserted. Speaking of a sitting President, they said that the "'President, personally, was not the subject to any process whatever . . . For [that] would . . . put it in the power of a common justice to exercise any authority over him and stop the whole machine of Government.'" 457 U.S., at 751, n. 31, 102 S.Ct., at 2702, n. 31 (quoting Journal of William Maclay 167 (E. Maclay ed. 1890) (Sept. 26 journal entry reporting exchange between Senator Maclay, Adams, and Ellsworth)). They included in their claim a kind of immunity from criminal, as well as civil, process. They responded to a counterargument--that the President "was not above the laws," and would have to be arrested if guilty of crimes--by stating that the President would first have to be impeached, and could then be prosecuted. 9 Documentary History of First Federal Congress of United States 168 (K. Bowling & H. Veit eds. 1988) (Diary of William Maclay). This court's rejection of Adams' and Ellsworth's views in the context of criminal proceedings, see *ante*, at ___, does not deprive those views of authority here. See Fitzgerald, *supra*, at 751-752, n. 31, 102 S.Ct., at 2702, n. 31. Nor does the fact that Senator William Maclay, who reported the views of

Adams and Ellsworth, "went on to point out in his diary that he virulently disagreed with them." Ante, at ___, n. 23. Maclay, unlike Adams and Ellsworth, was not an important political figure at the time of the constitutional debates. See *Diary of William Maclay* xi-xiii.

Third, in 1807, a sitting President, Thomas Jefferson, during a dispute about whether the federal courts could subpoena his presence in a criminal case, wrote the following to United States Attorney George Hay:

"The leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other, and none are more jealous of this than the judiciary. But would the executive be independent of the judiciary, if he were subject to the commands of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties?" 10 Works of Thomas Jefferson 404, n. (P. Ford ed. 1905) (letter of June 20, 1807, from President Thomas Jefferson to United States Attorney George Hay), quoted in *Fitzgerald*, 457 U.S., at 751, n. 31; 102 S.Ct., at 2702, n. 31.

Three days earlier Jefferson had written to the same correspondent:

"To comply with such calls would leave the nation without an executive branch, whose agency, nevertheless, is understood to be so constantly necessary, that it is the sole branch which the constitution requires to be always in function. It could not then mean that it should be withdrawn from its station by any co-ordinate authority." 10 Works of Thomas Jefferson, at 401 (letter of June 17, 1807, from Thomas Jefferson to George Hay).

Jefferson, like Adams and Ellsworth, argued strongly for an immunity from both criminal and civil judicial process—an immunity greater in scope than any immunity, or any special scheduling factor, now at issue in the civil case before us. The significance of his views for present purposes lies in his conviction that the Constitution protected a sitting President from litigation that would "withdraw" a President from his current "constitutional duties." That concern may not have applied to Mr. *Fitzgerald's* 1982 case against a former President, but it is at issue in the current litigation.

Precedent that suggests to the contrary—that the Constitution does not offer a sitting President significant protections from potentially distracting civil litigation—consists of the following: (1) In several instances sitting Presidents have given depositions or testified at criminal trials, and (2) this Court has twice authorized the enforcement of subpoenas seeking documents from a sitting President for use in a criminal case.

I agree with the majority that these precedents reject any absolute Presidential immunity from all court process. But they do not cast doubt upon Justice Story's basic conclusion that "in civil cases," a sitting President "possess[es] an official inviolability" as necessary to permit him to "perform" the duties of his office without "obstruction or impediment."

The first set of precedents tells us little about what the Constitution commands, for they amount to voluntary actions on the part of a sitting President. The second set of precedents amounts to a search for documents, rather than a direct call upon Presidential time. More important, both sets of precedents involve criminal proceedings in which the President participated as a witness. Criminal proceedings, unlike private civil proceedings, are public acts initiated and controlled by the Executive Branch; see *United States v. Nixon*, 418 U.S., at 693-696, 94 S.Ct., at 3100-3102; they are not normally subject to postponement, see U.S. Const., Amdt. 6; and ordinarily they put at risk, not a private citizen's hope for monetary compensation, but a private citizen's freedom from enforced confinement, 418 U.S., at 711-712, and n. 19, 94 S.Ct., at 3109-3110, and n. 19; *Fitzgerald*, supra, at 754, n. 37, 102 S.Ct., at 2703, n. 37. See also

id., at 758, n. 41, 102 S.Ct., at 2705, n. 41. Nor is it normally possible in a criminal case, unlike many civil cases, to provide the plaintiff with interest to compensate for scheduling delay. See, e.g., *Winter v. Cerro Gordo County Conservation Bd.*, 925 F.2d 1069, 1073 (C.A.8 1991); *Foley v. Lowell*, 948 F.2d 10, 17-18 (C.A.1 1991); *Wooten v. McClendon*, 272 Ark. 61, 62-63, 612 S.W.2d 105, 106 (1981).

The remaining precedent to which the majority refers does not seem relevant in this case. That precedent, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585, 72 S.Ct. 863, 865-866, 96 L.Ed. 1153 (1952), concerns official action. And any Presidential time spent dealing with, or action taken in response to, that kind of case is part of a President's official duties. Hence court review in such circumstances could not interfere with, or distract from, official duties. Insofar as a court orders a President, in any such a proceeding, to act or to refrain from action, it defines, or determines, or clarifies, the legal scope of an official duty. By definition (if the order itself is lawful), it cannot impede, or obstruct, or interfere with, the President's basic task—the lawful exercise of his Executive authority. Indeed, if constitutional principles counsel caution when judges consider an order that directly requires the President properly to carry out his official duties, see *Franklin v. Massachusetts*, 505 U.S. 788, 827, 112 S.Ct. 2767, 2789, 120 L.Ed.2d 636 (1992) (SCALIA, J., concurring in part and concurring in judgment) (describing the "apparently unbroken historical tradition . . . implicit in the separation of powers" that a President may not be ordered by the Judiciary to perform particular Executive acts); id., at 802-803, 112 S.Ct., at 2776-2777 (plurality opinion of O'CONNOR, J.), so much the more must those principles counsel caution when such an order threatens to interfere with the President's properly carrying out those duties.

B

Case law, particularly, *Nixon v. Fitzgerald*, strongly supports the principle that judges hearing a private civil damages action against a sitting President may not issue orders that could significantly distract a President from his official duties. In *Fitzgerald*, the Court held that former President Nixon was absolutely immune from civil damage lawsuits based upon any conduct within the "outer perimeter" of his official responsibilities. 457 U.S., at 756, 102 S.Ct., at 2704. The holding rested upon six determinations that are relevant here.

First, the Court found that the Constitution assigns the President singularly important duties (thus warranting an "absolute," rather than a "qualified," immunity). Id., at 750-751, 102 S.Ct., at 2701-2702. Second, the Court held that "recognition of immunity" does not require a "specific textual basis" in the Constitution. Id., at 750, n. 31, 102 S.Ct., at 2701, n. 31. Third, although physical constraint of the President was not at issue, the Court nevertheless considered Justice Story's constitutional analysis, discussed supra, at ___, "persuasive." 457 U.S., at 749, 102 S.Ct., at 2701. Fourth, the Court distinguished contrary precedent on the ground that it involved criminal, not civil, proceedings. Id., at 754, and n. 37, 102 S.Ct., at 2703, and n. 37. Fifth, the Court's concerns encompassed the fact that "the sheer prominence of the President's office" could make him "an easily identifiable target for suits for civil damages." Id., at 752-753, 102 S.Ct., at 2702-2703. Sixth, and most important, the Court rested its conclusion in important part upon the fact that civil lawsuits "could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve." Id., at 753, 102 S.Ct., at 2703.

The majority argues that this critical, last-mentioned, feature of the case is dicta. Ante, at ___, n. 19. In the majority's view, since the defendant was a former President, the lawsuit could not have distracted him from his official duties; hence the case must rest entirely upon an alternative concern, namely that a President's fear of civil lawsuits based upon his official duties could distort his official decisionmaking. The majority, however, overlooks the fact that Fitzgerald set forth a single immunity (an absolute immunity) applicable both to sitting and former Presidents. Its reasoning focused upon both. Its key paragraph, explaining why the President enjoys an absolute immunity rather than a qualified immunity, contains seven sentences, four of which focus primarily upon time and energy distraction and three of which focus primarily upon official decision distortion. Indeed, that key paragraph begins by stating:

"Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." 457 U.S., at 751, 102 S.Ct., at 2702.

Moreover, the Court, in numerous other cases, has found the problem of time and energy distraction a critically important consideration militating in favor of a grant of immunity. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 817-818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982) (qualified immunity for Presidential assistants based in part on "costs of trial" and "burdens of broad-reaching discovery" that are "peculiarly disruptive of effective government"); *Imbler v. Pachtman*, 424 U.S. 409, 423, 96 S.Ct. 984, 991, 47 L.Ed.2d 128 (1976) (absolute immunity of prosecutors based in part upon concern about "deflection of the prosecutor's energies from his public duties"); *Tenney v. Brandhove*, 341 U.S. 367, 377, 71 S.Ct. 783, 788, 95 L.Ed. 1019 (1951) (absolute immunity for legislators avoids danger they will "be subjected to the cost and inconvenience and distractions of a trial"). Indeed, cases that provide public officials, not with immunity, but with special protective procedures such as interlocutory appeals, rest entirely upon a "time and energy distraction" rationale. See *Behrens v. Pelletier*, 516 U.S. ___, 116 S.Ct. 834, 839, 133 L.Ed.2d 773 (1996) ("[G]overnment official[s] right . . . to avoid standing trial [and] to avoid the burdens of such pretrial matters as discovery" are sufficient to support an immediate appeal from "denial of a claim of qualified immunity") (citations and internal quotation marks omitted); *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411 (1985) ("[E]ntitlement not to stand trial or face the other burdens of litigation . . . is effectively lost if a case is erroneously permitted to go to trial") (citing *Harlow*, supra, at 818, 102 S.Ct., at 2738).

It is not surprising that the Court's immunity-related case law should rely on both distraction and distortion, for the ultimate rationale underlying those cases embodies both concerns. See *Pierson v. Ray*, 386 U.S. 547, 554, 87 S.Ct. 1213, 1218, 18 L.Ed.2d 288 (1967) (absolute judicial immunity is needed because of "burden" of litigation, which leads to "intimidation"); *Bradley v. Fisher*, 13 Wall. 335, 349, 20 L.Ed. 646 (1872) (without absolute immunity a judge's "office [would] be degraded and his usefulness destroyed" and he would be forced to shoulder "burden" of keeping full records for use in defending against suits). The cases ultimately turn on an assessment that the threat that a civil damage lawsuit poses to a public official's ability to perform his job properly. And, whether they provide an absolute immunity, a qualified immunity, or merely a special procedure, they ultimately balance consequent potential public harm against private need. Distraction and distortion are equally important ingredients of that potential public harm. Indeed, a lawsuit that significantly distracts an official from his public duties can distort the content of a public decision just as can a threat of potential future liability. If the latter concern can justify an "absolute" immunity in the case of a President no longer in

office, where distraction is no longer a consideration, so can the former justify, not immunity, but a postponement, in the case of a sitting President.

III

The majority points to the fact that private plaintiffs have brought civil damage lawsuits against a sitting President only three times in our Nation's history; and it relies upon the threat of sanctions to discourage, and "the court's discretion" to manage, such actions so that "interference with the President's duties would not occur." Ante, at ___. I am less sanguine. Since 1960, when the last such suit was filed, the number of civil lawsuits filed annually in Federal District Courts has increased from under 60,000 to about 240,000, see Administrative Office of the United States Courts, Statistical Tables for the Federal Judiciary 27 (1995); Annual Report of the Director of the Administrative Office of the United States Courts-1960, at p. 224 (1961); the number of federal district judges has increased from 233 to about 650, see Administrative Office of United States Courts, Judicial Business of United States Courts 7 (1994); Annual Report of the Director of the Administrative Office of the United States Courts-1960, supra, at p. 205; the time and expense associated with both discovery and trial have increased, see, e.g., Bell, Varner & Gottschalk, Automatic Disclosure in Discovery-The Rush To Reform, 27 Ga. L.Rev. 1, 9-11 (1992); see also S.Rep. No. 101-416, p. 1 (1990); Judicial Improvements Act of 1990, Pub.L. 101-650, 104 Stat. 5089; an increasingly complex economy has led to increasingly complex sets of statutes, rules and regulations, that often create potential liability, with or without fault. And this Court has now made clear that such lawsuits may proceed against a sitting President. The consequence, as the Court warned in *Fitzgerald*, is that a sitting President, given "the visibility of his office," could well become "an easily identifiable target for suits for civil damages," 457 U.S., at 753, 102 S.Ct., at 2703. The threat of sanctions could well discourage much unneeded litigation, ante, at ___, but some lawsuits (including highly intricate and complicated ones) could resist ready evaluation and disposition; and individual district court procedural rulings could pose a significant threat to the President's official functions.

I concede the possibility that district courts, supervised by the Courts of Appeals and perhaps this Court, might prove able to manage private civil damage actions against sitting Presidents without significantly interfering with the discharge of Presidential duties-at least if they manage those actions with the constitutional problem in mind. Nonetheless, predicting the future is difficult, and I am skeptical. Should the majority's optimism turn out to be misplaced, then, in my view, courts will have to develop administrative rules applicable to such cases (including postponement rules of the sort at issue in this case) in order to implement the basic constitutional directive. A Constitution that separates powers in order to prevent one branch of Government from significantly threatening the workings of another could not grant a single judge more than a very limited power to second guess a President's reasonable determination (announced in open court) of his scheduling needs, nor could it permit the issuance of a trial scheduling order that would significantly interfere with the President's discharge of his duties-in a private civil damage action the trial of which might be postponed without the plaintiff suffering enormous harm. As Madison pointed out in *The Federalist* No. 51, "[t]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack." *Id.*, at 321-322 (emphasis added). I agree with

the majority's determination that a constitutional defense must await a more specific showing of need; I do not agree with what I believe to be an understatement of the "danger." And I believe that ordinary case-management principles are unlikely to prove sufficient to deal with private civil lawsuits for damages unless supplemented with a constitutionally based requirement that district courts schedule proceedings so as to avoid significant interference with the President's ongoing discharge of his official responsibilities.

IV

This case is a private action for civil damages in which, as the District Court here found, it is possible to preserve evidence and in which later payment of interest can compensate for delay. The District Court in this case determined that the Constitution required the postponement of trial during the sitting President's term. It may well be that the trial of this case cannot take place without significantly interfering with the President's ability to carry out his official duties. Yet, I agree with the majority that there is no automatic temporary immunity and that the President should have to provide the District Court with a reasoned explanation of why the immunity is needed; and I also agree that, in the absence of that explanation, the court's postponement of the trial date was premature. For those reasons, I concur in the result.

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1. See 28 U.S.C. §1332. Jurisdiction over the federal claims is authorized by 28 U.S.C. §§1331 and 1343.

2. Complaint ¶26.

3. As the matter is not before us, see *Jones v. Clinton*, 72 F.3d 1354, 1359, n. 7 (C.A.8 1996), we do not address the question whether the President's immunity from damages liability for acts taken within the "outer perimeter" of his official responsibilities provides a defense to the fourth count of the complaint. See *Nixon v. Fitzgerald*, 457 U.S. 731, 756, 102 S.Ct. 2690, 2704, 73 L.Ed.2d 349 (1982).

4. Record, Doc. No. 9; see 858 F.Supp. 902, 904 (E.D.Ark.1994).

5. See App. to Pet. for Cert. 53.

6. 869 F.Supp., at 698. She explained: "Nowhere in the Constitution, congressional acts, or the writings of any judge or scholar, may any credible support for such a proposition be found. It is contrary to our form of government, which asserts as did the English in the Magna Carta and the Petition of Right, that even the sovereign is subject to God and the law." *Ibid.*

7. Although, as noted above, the District Court's initial order permitted discovery to go forward, the court later stayed discovery pending the outcome of the appeals on the immunity issue. 879 F.Supp. 86 (E.D.Ark.1995).

8. Over the dissent of Judge McMillian, the Court of Appeals denied a suggestion for rehearing en banc. 81 F.3d 78 (C.A.8 1996).

9. Brief for United States in Support of Petition 5.

10. Brief in Opposition 8, 10, 23.

11. As we have explained: "'If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.' *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 [65 S.Ct. 152, 154, 89 L.Ed. 101 (1944)]. It has long been the Court's 'considered practice not to decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied . . . or to decide any constitutional question except with reference to the particular facts to which it is to be applied' *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461 [65 S.Ct. 1384, 1389-1390, 89 L.Ed. 1725 (1945)]. 'It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.' *Burton v. United States*, 196 U.S. 283, 295 [25 S.Ct. 243, 245, 49 L.Ed. 482 (1905)].' *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 570, n. 34, 67 S.Ct. 1409, 1420, n. 34, 91 L.Ed. 1666 (1947).

12. The two questions presented in the certiorari petition are: "1. Whether the litigation of a private civil damages action against an incumbent President must in all but the most exceptional cases be deferred until the President leaves office"; and "2. Whether a district court, as a proper exercise of judicial discretion, may stay such litigation until the President leaves office." Our review is confined to these issues. See this Court's Rule 14.1(a).

13. Because the Supremacy Clause makes federal law "the supreme Law of the Land," Art. VI, cl. 2, any direct control by a state court over the President, who has principal responsibility to ensure that those laws are "faithfully executed," Art. II, §3, may implicate concerns that are quite different from the interbranch separation of powers questions addressed here. Cf., e.g., *Hancock v. Train*, 426 U.S. 167, 178-179, 96 S.Ct. 2006, 2012-2013, 48 L.Ed.2d 555 (1976); *Mayo v. United States*, 319 U.S. 441, 445, 63 S.Ct. 1137, 1139-1140, 87 L.Ed. 1504 (1943). See L. Tribe, *American Constitutional Law* 513 (2d ed.1988) ("absent explicit congressional consent no state may command federal officials . . . to take action in derogation of their . . . federal responsibilities").

14. Although Presidents have responded to written interrogatories, given depositions, and provided videotaped trial testimony, see *infra*, at ___, no sitting President has ever testified, or been ordered to testify, in open court.

15. See *People ex rel. Hurley v. Roosevelt*, 179 N.Y. 544, 71 N.E. 1137 (1904); *DeVault v. Truman*, 354 Mo. 1193, 194 S.W.2d 29 (1946).
16. See *Bailey v. Kennedy*, No. 757,200 (Cal.Super.Ct.1960); *Hills v. Kennedy*, No. 757,201 (Cal.Super.Ct.1960).
17. See 72 F.3d, at 1362, n. 10.
18. Some of these cases defined the immunities of state and local officials in actions filed under 42 U.S.C. §1983. See, e.g., *Imbler v. Pachtman*, 424 U.S. 409, 422-423, 96 S.Ct. 984, 991-992, 47 L.Ed.2d 128 (1976) (prosecutorial immunity); *Tenney v. Brandhove*, 341 U.S. 367, 376-377, 71 S.Ct. 783, 788, 95 L.Ed. 1019 (1951) (legislative immunity); *Pierson v. Ray*, 386 U.S. 547, 554-555, 87 S.Ct. 1213, 1217-1218, 18 L.Ed.2d 288 (1967) (judicial immunity). The rationale underlying our official immunity jurisprudence in cases alleging constitutional violations brought against federal officials is similar. See, e.g., *Butz v. Economou*, 438 U.S. 478, 500-501, 98 S.Ct. 2894, 2907-2908, 57 L.Ed.2d 895 (1978).
19. Petitioner draws our attention to dicta in *Fitzgerald*, which he suggests are helpful to his cause. We noted there that "[b]ecause of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government," 457 U.S., at 751, 102 S.Ct., at 2702, and suggested further that "[c]ognizance of . . . personal vulnerability frequently could distract a President from his public duties," *id.*, at 753, 102 S.Ct., at 2703. Petitioner argues that in this aspect the Court's concern was parallel to the issue he suggests is of great importance in this case, the possibility that a sitting President might be distracted by the need to participate in litigation during the pendency of his office. In context, however, it is clear that our dominant concern was with the diversion of the President's attention during the decisionmaking process caused by needless worry as to the possibility of damages actions stemming from any particular official decision. Moreover, *Fitzgerald* did not present the issue raised in this case because that decision involved claims against a former President.
20. In Jefferson's view, the subpoena jeopardized the separation of powers by subjecting the Executive Branch to judicial command. See 10 Works of Thomas Jefferson 404, n. (P. Ford ed.1905); *Fitzgerald*, 457 U.S., at 751, n. 31, 102 S.Ct., at 2702, n. 31 (quoting Jefferson's comments).
21. 9 Documentary History of First Federal Congress of the United States 168 (K. Bowling & H. Veit eds., 1988) (Diary of William Maclay).
22. See 3 J. Story, Commentaries on the Constitution of the United States §1563, pp. 418-419 (1833).
23. Jefferson's argument provides little support for respondent's position. As we explain later, the prerogative Jefferson claimed was denied him by the Chief Justice in the very decision Jefferson was protesting, and this Court has subsequently reaffirmed that holding. See *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). The statements supporting a

similar proposition recorded in Senator Maclay's diary are inconclusive of the issue before us here for the same reason. In addition, this material is hardly proof of the unequivocal common understanding at the time of the founding. Immediately after mentioning the positions of Adams and Ellsworth, Maclay went on to point out in his diary that he virulently disagreed with them, concluding that his opponents' view " [s]hows clearly how amazingly fond of the old leaven many People are." Diary of Maclay 168.

Finally, Justice Story's comments in his constitutional law treatise provide no substantial support for respondent's position. Story wrote that because the President's "incidental powers" must include "the power to perform [his duties], without any obstruction," he "cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability." 3 Story, §1563, at 418-419 (emphasis added). Story said only that "an official inviolability," *ibid.* (emphasis added), was necessary to preserve the President's ability to perform the functions of the office; he did not specify the dimensions of the necessary immunity. While we have held that an immunity from suits grounded on official acts is necessary to serve this purpose, see *Fitzgerald*, 457 U.S., at 749, 102 S.Ct., at 2701, it does not follow that the broad immunity from all civil damages suits that petitioner seeks is also necessary.

24. For that reason, the argument does not place any reliance on the English ancestry that informs our common-law jurisprudence; he does not claim the prerogatives of the monarchs who asserted that " [t]he King can do no wrong." See 1 W. Blackstone, *Commentaries* *246.

Although we have adopted the related doctrine of sovereign immunity, the common-law fiction that " [t]he king . . . is not only incapable of doing wrong, but even of thinking wrong," *ibid.*, was rejected at the birth of the Republic. See, e.g., *Nevada v. Hall*, 440 U.S. 410, 415, and nn. 7-8, 99 S.Ct. 1182, 1185, and nn. 7-8, 59 L.Ed.2d 416 (1970); *Langford v. United States*, 101 U.S. 341, 342-343, 25 L.Ed. 1010 (1880).

25. See, e.g., A. Tourtellot, *The Presidents on the Presidency* 346-374 (1964) (citing comments of, among others, George Washington, John Quincy Adams, Benjamin Harrison, Theodore Roosevelt, William Howard Taft, and Woodrow Wilson); H. Finer, *The Presidency: Crisis and Regeneration* 35-37 (1960) (citing similar remarks by a number of Presidents, including James Monroe, James K. Polk, and Harry Truman).

26. L. Johnson, *The Vantage Point* 425 (1971).

27. The Amendment sets forth, *inter alia*, an elaborate procedure for Presidential succession in the event that the Chief Executive becomes incapacitated. See U.S. Const., Amdt. 25, §§3-4.

28. 111 Cong. Rec. 15595 (1965) (remarks of Sen. Bayh).

29. We noted in *Fitzgerald*: "Article II, §1, of the Constitution provides that "[t]he executive Power shall be vested in a President of the United States" This grant of authority establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity. These include the enforcement of federal law-it is the President who is charged constitutionally to "take Care that the Laws be faithfully executed"; the conduct of foreign affairs-a realm in which the Court has

recognized that "[i]t would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret"; and management of the Executive Branch-a task for which "imperative reasons requir[e] an unrestricted power [in the President] to remove the most important of his subordinates in their most important duties." 457 U.S., at 749-750, 102 S.Ct., at 2701 (footnotes omitted).

30. See *Loving v. United States*, 517 U.S. ----, ----, 116 S.Ct. 1737, 1742-1743, 135 L.Ed.2d 36 (1996); *Mistretta v. United States*, 488 U.S. 361, 382, 109 S.Ct. 647, 660, 102 L.Ed.2d 714 (1989) ("concern of encroachment and aggrandizement . . . has animated our separation-of-powers jurisprudence"); *The Federalist* No. 51, p. 349 (J. Cooke ed.1961) ("the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means, and personal motives, to resist encroachments of the others").

31. See also *United States v. Klein*, 13 Wall. 128, 147, 20 L.Ed. 519 (1872) (noting that Congress had "inadvertently passed the limit which separates the legislative from the judicial power").

32. See also *Bowsher v. Synar*, 478 U.S. 714, 726, 106 S.Ct. 3181, 3188, 92 L.Ed.2d 583 (1986) ("structure of the Constitution does not permit Congress to execute the laws"). Cf. *INS v. Chadha*, 462 U.S. 919, 958, 103 S.Ct. 2764, 2787-2788, 77 L.Ed.2d 317 (1983); *Springer v. Philippine Islands*, 277 U.S. 189, 202-203, 48 S.Ct. 480, 482-483, 72 L.Ed. 845 (1928).

33. See *United States v. Ferreira*, 13 How. 40, 14 L.Ed. 40 (1852); *Hayburn's Case*, 2 Dall. 408, 1 L.Ed. 436 (1792). As we explained in *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113, 68 S.Ct. 431, 437, 92 L.Ed. 568 (1948), "[t]his Court early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive." More generally, "we have broadly stated that "executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution." *Morrison v. Olson*, 487 U.S. 654, 677, 108 S.Ct. 2597, 2612, 101 L.Ed.2d 569 (1988) (quoting *Buckley v. Valeo*, 424 U.S. 1, 123, 96 S.Ct. 612, 684, 46 L.Ed.2d 659 (1976)). These restrictions on judicial activities "help ensure the independence of the Judicial Branch and to prevent the Judiciary from encroaching into areas reserved for the other branches." 487 U.S., at 678, 108 S.Ct., at 2612; see also *Mistretta v. United States*, 488 U.S. 361, 385, 109 S.Ct. 647, 662, 102 L.Ed.2d 714 (1989).

34. We have long held that the federal courts may not resolve such matters. See, e.g., *Luther v. Borden*, 7 How. 1, 12 L.Ed. 581 (1849). As we explained in *Nixon v. United States*, 506 U.S. 224, 113 S.Ct. 732, 122 L.Ed.2d 1 (1993), "[a] controversy is nonjusticiable-i.e., involves a political question-where there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it" *Baker v. Carr*, 369 U.S. 186, 217 [82 S.Ct. 691, 710, 7 L.Ed.2d 663] (1962). But the courts must, in the first instance, interpret the text in question and determine whether and to what extent the issue is textually committed. See *ibid.*; *Powell v. McCormack*, 395 U.S. 486, 519 [89 S.Ct. 1944, 1962-1963, 23 L.Ed.2d 491] (1969)." *Id.*, at 228, 113 S.Ct., at 735.

35. See also *Olson*, 487 U.S., at 693-694, 108 S.Ct., at 2620-2621; *Nixon v. Administrator of General Services*, 433 U.S. 425, 443, 97 S.Ct. 2777, 2790, 53 L.Ed.2d 867 (1977); *United States v. Nixon*, 418 U.S. 683, 707, 94 S.Ct. 3090, 3107, 41 L.Ed.2d 1039 (1974); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 72 S.Ct. 863, 870, 96 L.Ed. 1153 (1952) (Jackson, J., concurring).

36. In *Fitzgerald*, we were able to discount the lack of historical support for the proposition that official-capacity actions against the President posed a serious threat to the office on the ground that a right to sue federal officials for damages as a result of constitutional violations had only recently been recognized. See *Fitzgerald*, 457 U.S., at 753, n. 33, 102 S.Ct., at 2703, n. 33; *Bivens v. Six Unknown Named Fed. Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). The situation with respect to suits against the President for actions taken in his private capacity is quite different because such suits may be grounded on legal theories that have always been applicable to any potential defendant. Moreover, because the President has contact with far fewer people in his private life than in his official capacity, the class of potential plaintiffs is considerably smaller and the risk of litigation less intense.

37. *The Federalist* No. 47, Pp. ____-____ (J. Cooke ed.1961) (emphasis in original). See *Mistretta*, 488 U.S., at 381, 109 S.Ct., at 659-660; *Nixon v. Administrator of General Services*, 433 U.S., at 442, n. 5, 97 S.Ct., at 2789, n. 5.

38. After the decision was rendered, Jefferson expressed his distress in a letter to a prosecutor at the trial, noting that "[t]he Constitution enjoins [the President's] constant agency in the concerns of 6. millions of people." 10 *Works of Thomas Jefferson* 404, n. (P. Ford ed.1905). He asked, "[i]s the law paramount to this, which calls on him on behalf of a single one?" *Ibid.*; see also *Fitzgerald*, 457 U.S., at 751-752, n. 31, 102 S.Ct., at 2702, n. 31 (quoting Jefferson's comments at length). For Chief Justice Marshall, the answer-quite plainly-was yes.

39. Of course, it does not follow that a court may "'proceed against the president as against an ordinary individual,'" *United States v. Nixon*, 418 U.S., at 715, 94 S.Ct., at 3111 (quoting *United States v. Burr*, 25 F.Cas. 187, 192 (No. 14,694) (C.C.Va. 1807)). Special caution is appropriate if the materials or testimony sought by the court relate to a President's official activities, with respect to which "[t]he interest in preserving confidentiality is weighty indeed and entitled to great respect." 418 U.S., at 712, 94 S.Ct., at 3109. We have made clear that in a criminal case the powerful interest in the "fair administration of criminal justice" requires that the evidence be given under appropriate circumstances lest the "very integrity of the judicial system" be eroded. *Id.*, at 709, 711-712, 94 S.Ct., at 3108, 3109.

40. There is, no doubt, some truth to Learned Hand's comment that a lawsuit should be "dread[ed] . . . beyond almost anything else short of sickness and death." 3 *Association of the Bar of the City of New York, Lectures on Legal Topics* 105 (1926). We recognize that a President, like any other official or private citizen, may become distracted or preoccupied by pending litigation. Presidents and other officials face a variety of demands on their time, however, some private, some political, and some as a result of official duty. While such distractions may be vexing to those subjected to them, they do not ordinarily implicate constitutional separation of powers concerns.

41. Although these claims are in fact analytically distinct, the District Court does not appear to have drawn that distinction. Rather than basing its decision on particular factual findings that might have buttressed an exercise of discretion, the District Court instead suggested that a discretionary stay was supported by the legal conclusion that such a stay was required by *Fitzgerald*. See 869 F.Supp., at 699. We therefore reject petitioner's argument that we lack jurisdiction over respondent's cross-appeal from the District Court's alternative holding that its decision was "also permitted," *inter alia*, "under the equity powers of the Court." *Ibid*. The Court of Appeals correctly found that pendant appellate jurisdiction over this issue was proper. See 72 F.3d, at 1357, n. 4. The District Court's legal ruling that the President was protected by a temporary immunity from trial-but not discovery-was "inextricably intertwined," *Swint v. Chambers County Comm'n*, 514 U.S. 35, 51, 115 S.Ct. 1203, 1212, 131 L.Ed.2d 60 (1995), with its suggestion that a discretionary stay having the same effect might be proper; indeed, "review of the [latter] decision [is] necessary to ensure meaningful review of the [former]," *ibid*.

42. See, e.g., Fed. Rule Civ. Proc. 11; 28 U.S.C. §1927; *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50, 111 S.Ct. 2123, 2136, 115 L.Ed.2d 27 (1991) (noting that "if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power" in imposing appropriate sanctions). Those sanctions may be set at a level "sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Fed. Rule Civ. Proc. 11(c)(2). As Rule 11 indicates, sanctions may be appropriate where a claim is "presented for any improper purpose, such as to harass," including any claim based on "allegations and other factual contentions [lacking] evidentiary support" or unlikely to prove well-grounded after reasonable investigation. Rules 11(b)(1), (3).

43. *United States v. Nixon*, 418 U.S., at 710-711, 94 S.Ct., at 3108-3109; see also *Fitzgerald*, 457 U.S., at 753, 102 S.Ct., at 2703 ("Courts traditionally have recognized the President's constitutional responsibilities and status as factors counseling judicial deference and restraint").

SMALL WARS JOURNAL

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Changing the Organizational Culture (Updated)

By Frontier 6

The technology of the Twenty-first Century – the “new media” – has made it possible for virtually anyone to have immediate access to an audience of millions around the world and to be somewhat anonymous. This technology has enabled and empowered the rise of a new enemy. This enemy is not constrained by the borders of a nation or the International Laws of War. The new media allows them to decentralize their command and control and disperse their elements around the globe. They stay loosely connected by an ideology, send cryptic messages across websites and via e-mail and recruit new members using the same new media technologies.

Responding to this challenge requires changes in our approach to warfare. The one thing we can change now does not require resources – just a change in attitudes and the organizational culture in our Army. Recent experiences in Iraq illustrate how important it is to address cultural change and also how very difficult it is to change culture: After MNF-I broke through the bureaucratic red-tape and was able to start posting on YouTube, MNF-I videos from Iraq were among the top ten videos viewed on YouTube for weeks after their posting. These videos included gun tape videos showing the awesome power the US military can bring to bear. Using YouTube – part of the new media – proved to be an extremely effective tool in countering an adaptive enemy. Here are some areas that our Army will need to address if we are going to change our culture with respect to this critical area:

First, we need to Encourage Soldiers to “tell/share their story”. Across America, there is a widely held perception that media coverage of the War in Iraq is overwhelmingly negative. We need to be careful to NOT blame the news media for this. The public has a voracious appetite for the sensational, the graphic and the shocking. We all have a difficult time taking our eyes off the train wreck in progress - it is human nature. Walter Cronkite once said “If it's extraordinary, and it affects us deeply, it's news.” Knowing this, we, as a military, owe it to the public to actively seek out and engage the media with our stories in order to provide them with a fuller perspective of the situation. When Soldiers do this, the media is very open and receptive. The public may have an appetite for the sensational, but when it comes to their men and women in uniform, they also have a very strong desire to hear their personal stories. They want to know what it is like, what the Soldiers are experiencing, and how the Soldiers feel about their mission. That is why we must encourage our Soldiers to interact with the media, to get onto blogs and to send their YouTube videos to their friends and family. When our Soldiers tell/share their stories, it has an overwhelmingly positive effect.

Just playing lip service to encouraging Soldiers is not enough. Leaders need to not only encourage but also Empower subordinates. A critical component of empowering is underwriting honest mistakes and failure. Soldiers are encouraged to take the initiative and calculated risk in the operational battlefield because we understand the importance of maintaining the offensive. However, once we move into the informational domain, we have a tendency to be zero defect and risk averse. Leaders have to understand and accept that not all media interactions are going to go well. Leaders need to assume risk in the information domain and allow subordinates the leeway to make mistakes. Unfortunately, the culture is such that the first time a subordinate makes a mistake in dealing with the media and gets punished for it, it will be the last time ANYONE in that organization takes a risk and engages with the media.

Hand in hand with encouragement and empowerment is Education. If Soldiers are better educated to deal with new media and its effects, they will feel more empowered and be encouraged to act. We need to educate Soldiers on how to deal with the media and how their actions can have strategic implications. They need to know what the second and third order effects of their actions are. I believe that most people want to do a good job. There are very few Soldiers out there who would intentionally harm the mission or intentionally do something to reflect poorly on their unit or the Army. When many of these incidents occur, and we have all seen them, it is because they just don't know that it is going to have that kind of effect and cause that kind of damage.

Finally, we need to Equip Soldiers to engage the new media. If we educate them and encourage them, we need to trust them enough to give them the tools to properly tell/share their stories. The experience of trying to gain YouTube access in Iraq and even back in the United States is a prime example. A suggestion for consideration might be equipping unit leaders with camcorders to document operations but also daily life. The enemy video tapes operations and then distorts and twists the information and images to misinform the world. What if we had documented video footage of the same operations which refuted what our enemies say? By the way, that is not enough, we have to get our images out FIRST! The first images broadcast become reality to viewers. If we wait until we see the enemy's images, we are being reactive and we have already squandered the opportunity.

Frontier 6 is Lieutenant General William B. Caldwell, IV, Commanding General of the Combined Arms Center at Ft. Leavenworth, Kansas, the command that oversees the Command and General Staff College and 17 other schools, centers, and training programs located throughout the United States. The Combined Arms Center is also responsible for: development of the Army's doctrinal manuals, training of the Army's commissioned and noncommissioned officers, oversight of major collective training exercises, integration of battle command systems and concepts, and supervision of the Army's Center for the collection and dissemination of lessons learned.

NOTES

- ¹ Wess Roberts, *Leadership Secrets of Attila the Hun* (New York: Grand Central Publishing, 1990), 17.
- ² *The Random House Dictionary of the English Language, Second Edition*, s.v. "loyalty."
- ³ "The Core Values and the Oath of Office | U.S. Marine Corps Officer Candidate's Guide," *Marine Corps Officer Home | U.S. Marine Corps Officer Candidate's Guide*, URL: <http://officer.marines.com/page/The-Core-Values-O.jsp>.
- ⁴ The Constitutional powers outlined in Article 1, Section 8 outline the responsibility of an elected civilian government to: "declare war"; "raise and support Armies"; "provide and maintain a Navy"; "make Rules for the Government and Regulation of the land and naval Forces"; "provide for the calling forth the Militia"; and "provide for organizing, arming, and disciplining, the Militia." *The Constitution of the United States* (Washington: U.S. Government Printing Office, 1989), 6, 7.
- ⁵ Alexander Hamilton, John Jay, James Madison, and Clinton Rossiter, *The Federalist Papers* (New York: Signet Classics, 2003), 147-148.
- ⁶ Samuel P. Huntington, *The Soldier and the State: The Theory and Politics of Civil-Military Relations* (Cambridge: Harvard University Press, 1957), 71, 83-85.
- ⁷ *The Constitution of the United States* (Washington: U.S. Government Printing Office, 1989), 22.
- ⁸ Thomas Norton, *The Constitution of the United States: Its Sources and Its Application* (Boston: Little, Brown, and Company, 1922), 198-199.
- ⁹ Department of Defense Directive 1325.6, *Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces*, 1 October 1996, 2. See Appendix A.
- ¹⁰ *Ibid.*, 2-3.
- ¹¹ Department of Defense Directive 1334.01, *Wearing the Uniform*, 26 October 2005, 2. See Appendix B.
- ¹² DODD 1325.6, 2, 4. See Appendix A.
- ¹³ Department of Defense Directive 1344.10, *Political Activities by Members of the Armed Forces on Active Duty*, 2 August 2004, 2. See Appendix C.
- ¹⁴ *Ibid.*, 9.
- ¹⁵ Joint Service Committee on Military Justice, *Manual for Courts-Martial United States* (Washington: U.S. Government Printing Office, 2008), IV-16.
- ¹⁶ *Ibid.*, IV-17.
- ¹⁷ *United States v. Howe*, 37 C.M.R. 429 (U.S.C.M.A 1967). See Appendix D.
- ¹⁸ *Manual for Courts-Martial United States*, IV-17.
- ¹⁹ *United States v. Howe*. See Appendix D.
- ²⁰ David Castellon, "A Costly Option? Letter criticizing the president could mean court-martial for officer," *Navy Times*, 17 June 2002, 18.
- ²¹ Howe, Kevin. "Air Force officer who criticized Bush won't face court martial." *AccessMyLibrary*, 13 June 2002, URL: http://www.accessmylibrary.com/coms2/summary_0286-6850272_ITM.
- ²² "The Newburgh Address," *Archiving Early America: Primary Source Material from 18th Century America*, URL: <http://www.earlyamerica.com/earlyamerica/milestones/newburgh/text.html>.
- ²³ David L. Marshall, Jr., "How General Washington and his Spectacles Saved the Republic," *Archiving Early America: Primary Source Material from 18th Century America*, URL: <http://www.earlyamerica.com/review/fall97/wshngton.html>.
- ²⁴ *Ibid.*
- ²⁵ Gen. Anthony Zinni, Conference Group 6 question and answer period, 12 October 2007. Gen. Zinni made a very distinct point to let both the AY 07-08 USMC Command and Staff Class and Conference Group 6 know that all of his comments were on the record and could be used. He said, "Nothing is non-attributional, everything is on the record. So you can quote me." See Appendix E.
- ²⁶ Tom Clancy, Tony Zinni, and Tony Koltz, *Battle Ready* (New York: Putnam Pub Group, 2004), 425.
- ²⁷ Fred Kaplan, "Could Rumsfeld court-martial the retired generals?" *Slate Magazine*. 26 April 2006, URL: <http://www.slate.com/id/2140616/>.
- ²⁸ "Army chief: Force to occupy Iraq massive." *USATODAY.com*, 25 February 2003, URL: http://www.usatoday.com/news/world/iraq/2003-02-25-iraq-us_x.htm.
- ²⁹ Eric Schmitt, "THREATS AND RESPONSES: MILITARY SPENDING; Pentagon Contradicts General On Iraq Occupation Force's Size," *The New York Times*, 28 February 2003, URL: .

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³⁰ Jim Rutenburg, "Ex-general defended on Iraq war estimates." *International Herald Tribune*, 17 Apr 2006, URL: <http://www.ihf.com/articles/2006/04/17/news/generals.php>.

³¹ Ibid.

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³³ "Gen. Zinni: 'They've Screwed Up', Former Top Commander Condemns Pentagon Officials Over Iraq War." *CBSNews.com*, 21 May 2004, URL: <http://www.cbsnews.com/stories/2004/05/21/60minutes/main618896.shtml>.

³⁴ Ibid.

³⁵ Ibid.

³⁶ "Transcript for April 2 - Meet the Press." *MSNBC*, 2 April 2006, URL:

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³⁷ Clancy, 426.

³⁸ Frank Gaffney, Jr. "A Purple Heart in war of ideas?" *The Washington Times*, 8 January 2008, URL:

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³⁹ Ibid.

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⁴¹ Stephen Coughlin, "To Our Great Detriment: Ignoring What Extremist Say About Jihad" (Masters thesis, National Defense Intelligence College, 2007), 229-233.

⁴² Fred Lucas, "Islam Expert Not Forced Out, Congresswoman Says." *CNSNews.com*, 6 February 2008, URL:

<http://www.cnsnews.com/ViewNation.asp?Page=/Nation/archive/200802/NAT20080206b.html>.

⁴³ *Clinton v. Jones*, (95-1853), 520 U.S. 681 (1997.) See Appendix F.

⁴⁴ Ibid.

⁴⁵ Steven Meyers, "TESTING OF A PRESIDENT: CRITICS; Marines Scold Officer Who Called Clinton an 'Adulterous Liar' in a Column." *The New York Times*, 14 November 1998, URL:

<http://query.nytimes.com/gst/fullpage.html?res=9E06E5D81231F937A25752C1A96E958260>.

⁴⁶ *Manual for Courts-Martial United States*, IV-114-115.

⁴⁷ Ibid, IV-105-107.

⁴⁸ Meyers.

⁴⁹ Daniel Rabil, "Please, Impeach My Commander in Chief." *The Washington Times*, 9 November 1998, sec. A.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Rowan Scarborough, "Major gets punishment for criticizing President." *The Washington Times*, 7 December 1998, sec. A.

⁵⁴ Steven Meyers, "Military Warns Soldiers Of Failure to Hail Chief." *The New York Times*, 21 October 1998, URL:

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⁵⁷ Department of Defense Electronic Memorandum, "Information Security/Website Alert," found at:

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⁵⁸ Ibid.

⁵⁹ William Caldwell, "Changing the Organizational Culture (Updated)." *Small Wars Journal*, 1 January 2008, URL:

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⁶⁰ Ibid.

⁶¹ Paul Yingling, "A Failure in Generalship." *Armed Forces Journal* (2007), 17-23, 45.

⁶² Ibid, 22.

⁶³ Josh White, "Ex-Commander In Iraq Faults War Strategy." *The Washington Post*, 13 October 2007, A1.

⁶⁴ "The Man in the Arena - April 23, 1910 - Theodore Roosevelt Speeches- Roosevelt Almanac." *Theodore Roosevelt - Almanac of Theodore Roosevelt - 26th President of the U.S.A. - Teddy Roosevelt*, URL:

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